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91-1168

No. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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INTERNATIONAL EATERIES OF AMERICA, INC.

Petitioner,

v.

BROWARD COUNTY, FLORIDA

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Does a federal court of appeals, in concluding that the case of *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), controls their analysis of the validity of a municipal ordinance, have the authority to extend or relax the legal requirements for constitutional validity enunciated in the cited decision?

II. Is a municipal ordinance regulating protected expression which does not adequately articulate, establish or support the existence of secondary effects "content neutral", as contemplated by the test for validity in *United States v. O'Brien*, 391 U.S. 367 (1968), or a proper time, place and manner regulation?

III. Is a municipal ordinance regulating protected expression which does not adequately articulate, establish or support the existence of secondary effects "narrowly tailored", as contemplated by the test for validity in *United States v. O'Brien*, 391 U.S. 367 (1968), or a proper time, place and manner regulation?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, International Eateries of America, Inc., a Florida corporation, d/b/a "Thee Dollhouse III" and the Respondent, Broward County, a political subdivision of the State of Florida.

There are no entities to report or list pursuant to Supreme Court Rule 28.1.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit, reported as *International Eateries of America, Inc. v. Broward County, Florida*, 941 F.2d 1157 (11th Cir. 1991) is reprinted in Appendix "A". The Memorandum Opinion Containing Findings of Fact and Conclusions of Law (Aronovitz, D.J.), reported as *International Eateries of America, Inc. v. Broward County, Florida*, 726 F.Supp. 1568 (S.D. Fla. 1989) is reprinted in Appendix "B". An earlier related action which included the

same parties and resulted in a Final Judgment and Memorandum Opinion is reported as *International Eateries of America, Inc. v. Broward County, Florida*, 726 F.Supp. 1556 (S.D. Fla. 1987) is reprinted in Appendix "C". The Order of the Court of Appeals denying Petitioner International Eateries of America, Inc.'s Petition for Rehearing is reprinted in Appendix "D".

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 and § 1988 and 28 U.S.C. § 1331 and § 1343, the Petitioner brought this suit in the United States District Court, Southern District of Florida. On December 15, 1989, the Southern District entered Final Judgment against the Petitioner.

Petitioner appealed and the United States Court of Appeals for the Eleventh Circuit entered its Opinion on September 12, 1991, affirming the decision of the Southern District. International Eateries of America, Inc. timely filed a Petition for Rehearing. The Order denying the Petition for Rehearing was filed on October 16, 1991. This Petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law ... abridging the freedom of speech ...

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.

UNITED STATES CODE

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. Section 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United

States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, . . . in any action or proceeding to enforce a provision [42 U.S.C. 1981-1983 . . .], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

ORDINANCES ENACTED BY BROWARD COUNTY, FLORIDA

Broward County Zoning Code, Article XIII Regulation of Certain Designated Uses, § 39-225 and § 39-226 are reprinted and included in their entirety in Appendix "E".

STATEMENT OF THE CASE

Petitioner, International Eateries of America, Inc. operates a nightclub known as "Thee Dollhouse III" in unincorporated Broward County, Florida. In all prior proceedings, the parties have stipulated that the primary form of entertainment at Thee Dollhouse III is non-obscene nude dancing. In April of 1986, the appropriate Broward County agencies served two (2) notices of violation upon International Eateries of America, Inc., alleging that the continued operation of the business was in violation of several sections of the Broward County, Florida Code of Ordinances.

The first notice alleged that Thee Dollhouse III was in violation of the Broward County ordinance section prohibiting the location of adult nightclubs within 500 feet of a residentially zoned district and within 1000 feet of a church (the "distance ordinances"). The second notice stated that Thee Dollhouse III was in violation of the

Broward County ordinance sections which purported to allow the legal operation of adult nightclubs only within a special zoning district established through appropriate zoning designation (the "special use ordinances"). To operate an adult nightclub, full compliance with all ordinance code sections was necessary.

Thee Dollhouse III is within 500 feet of a residentially zoned district. There are three residential properties less than 500 feet from the establishment as calculated by the property line measurement requirements imposed by Article XIII, § 39-225(c) of the Broward County, Florida Code of Ordinances. Appendix "E", Pages 1-3.

It is also undisputed that, applying the measurement of setback distance in accordance with the applicable ordinance section, a Jehovah's Witness Kingdom Hall is located approximately 885 feet from Thee Dollhouse III.

Finally, it is undisputed that Thee Dollhouse III is not in a zoning district which has been designated a special zoning district which would permit operation of adult night clubs pursuant to the special uses requirement.

Subsequent to the notices of violation issued by the County, International Eateries of America, Inc. filed an action in the United States District Court for the Southern District of Florida seeking to enjoin the County from enforcing the ordinances. The district court stayed the proceedings while International Eateries in good faith pursued administrative remedies with the County. Presenting several legal bases, International Eateries applied to the appropriate Broward County agency for a rezoning of the property and also to the Broward County Board of Adjustment for a variance from the distance requirements. The County denied the application for rezoning and concluded that it therefore had no reason to act on the application for variance.

In the first opinion precipitated by the instant sequence of events, *International Eateries v. Broward County*, 726 F.Supp. 1556 (S.D. Fla. 1987) ("*Dollhouse I*"), the district court held that the special use ordinances, as applied to International Eateries, violated the First Amendment because the ordinances did not advance a substantial government interest and did not leave available alternative channels for International Eateries to conduct its business. 726 F.Supp. 1556, 1566-67. Appendix "C", Page 28.

The district court, in *Dollhouse I* included in its Findings of Facts the correct observation that the "distance ordinances" were adopted in September of 1977 and June of 1978. No mention is made that the County presented or considered any testimony, evidence, studies, or any other type of supporting data in support of the adoption of these ordinances. No finding of fact was made that any articulated, supported justification for the valid adoption of the ordinances was ever properly established.

The district court found that, "Although no special zoning studies seem to have been made as a predicate for the adoption of the ordinances, testimony and evidence was adduced that they are modeled after the City of Detroit ordinances." Appendix "C", Page 11. (Emphasis added).

In March of 1985, the Board of County Commissioners adopted the special zoning district ordinances. The district court, in *Dollhouse I*, observed that only one plot of land, measuring approximately three quarters of an acre, existed in unincorporated Broward County which was zoned B-2B, the appropriate zoning district for an adult nightclub. No other area other than the one single site qualified for the zoning use of adult nightclubs at the time, and the procedures adopted by the Broward County Commission required that, for any location to be used for that purpose, there must first be a

petition for rezoning to establish a B-2B district. The existing zoning of International Eateries' property was General Business B-3. The existing land use designation for the property was commercial. Regardless of this, the restaurant and nightclub were deemed to be non-conforming under the zoning code specifically because of the content and nature of the entertainment provided by the establishment.

International Eateries' constitutional challenge to Broward County's special use ordinances was granted and the County was permanently enjoined from enforcing the ordinances. Appendix "C", Page 28.

In regards to the distance ordinances, the district court held that they were not unconstitutional on their face, but that International Eateries' challenge to the distance ordinances as applied was premature because the appropriate Broward County agency had not yet ruled on the application for zoning variance filed by the Petitioner. Id. at 1563-64. Appendix "C", Page 27.

On November 25, 1986, International Eateries filed a petition to the Broward County Office of Planning seeking to rezone the subject property from a General Business B-3 District to a Special Business B-2B District. On March 24, 1987, the Broward County Board of County Commissioners denied the petition for rezoning.

On December 15, 1987, Thee Dollhouse III filed a petition with the County's Building and Zoning Enforcement Division seeking an automatic waiver of the 500 foot residential district prohibition, pursuant to Section 39-225(b). That provision reads: It shall be unlawful hereafter to establish any designated use within unincorporated Broward County if the proposed location is within 500 feet of a residentially zoned district. This prohibition shall be waived upon the presentment to the building and zoning enforcement division of a written

petition requesting such waiver, signed by 51 percent of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed location of the designated use.

The petition filed by International Eateries contained the signatures of more than 51% of those persons residing and owning residential real property within 500 feet of Thee Dollhouse III. Despite this fact, the petition was rejected by the County because it did not contain any signatures of any persons ". . . operating or managing a business." The County denied the petition because it interpreted the ordinance as also requiring signatures of operators and managers of businesses within the area.

It was adduced through the Chief Zoning Inspector for Broward County that she had indeed received the petition from International Eateries and that she concluded there to be a larger "group or universe of potential signators" based on a review of zoning certificates maintained by the Zoning Department. This conclusion resulted directly from the County's interpretation of the word "or" as used in the waiver provision.

International Eateries then requested a waiver of the distance requirements from the County's Planning and Zoning Board as well as a waiver from the Broward County Commission. Both these requests were denied.

In June, 1988, International Eateries again filed an action in district court seeking to enjoin enforcement of the distance ordinances. *International Eateries v. Broward County*, 726 F.Supp. 1568 (S.D. Fla. 1989) ("*Dollhouse II*"). By stipulation and agreement, the parties agreed that the prior record and all exhibits in the earlier related action ("*Dollhouse I*") be taken into consideration by the district court through judicial notice.

As the district court again observed, no special zoning studies seemed to have been made as a predicate for

the adoption of the zoning ordinances and it was found that the ordinances were simply "modeled" after the City of Detroit ordinances at issue in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976). Appendix "B", Pages 6-7.

The district court denied International Eateries relief, finding the ordinances valid. An appeal of this decision was taken to the United States Court of Appeals for the Eleventh Circuit. In its opinion, the Court of Appeals affirmed the district court. A petition for rehearing was filed by International Eateries which was denied on October 16, 1991.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS UPHOLDING THE VALIDITY OF THE BROWARD COUNTY ORDINANCES CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND THE FEDERAL COURT OF APPEALS AND INVOLVES A CONSTITUTIONAL QUESTION OF NATIONWIDE IMPORTANCE.

A. The Court of Appeals' Conclusion That it is Constitutionally Permissible to Regulate Protected Expression Through the Zoning Power Conflicts With This Court's Opinions in *Young v. American Mini Theaters*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) by Relaxing and Departing From the Requirements for Validity Enumerated Therein.

The complex issues involved in a judicial consideration of the regulation of "adult entertainment" and

the delicate balance needed between such regulation and proper respect for the protection of such material under the First Amendment have been the subject of jurisprudential effort of incredible magnitude. One explanation of this phenomena was made in the case of *Roth v. United States*, 354 U.S. 476 (1957):

> ". . . Sex, a great and mysterious motive force in human life, has undisputably been a subject of absorbing interest to mankind through the ages. It is one of the vital problems of human interest and public concern." *Id.* at 487.[1]

The Court of Appeals, in administering the case below, observed that the regulation of non-obscene nude dancing had often been addressed by the federal courts. The court stated that, on several occasions, this Court had assumed, without deciding, that nude dancing was protected

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[1] As the Court went on to say:

"As to all such problems, this Court said in *Thornhill v. State of Alabama*, 310 U.S. 88, 'The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. * * * Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *Id.* at 487-488.

expression under the First Amendment.[2] The court also stated that:

> "In a related context, the Supreme Court has held that under some circumstances cities may enact zoning ordinances that require adult movie theatres to locate only in certain areas, provided that the purpose of the regulation is to control the 'secondary effects' of these businesses. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, (1976). These cases have been applied by the lower federal courts to the regulation of nude dancing. *See, e.g., International Food & Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); and *Envy Ltd. v. City of Louisville*, 734 F.Supp. 785 (W.D. Ky. 1990)." *International Eateries of America v. Broward County*, 941 F.2d 1157 (11th Cir. 1991).

Expanding further on their basis of analysis, the Court of Appeals undertook an examination of the first case in which this Court squarely addressed the protection afforded to nude dancing under the First Amendment, *Barnes v. Glen Theatre, Inc.*, _____ U.S. _____, 111 S.Ct.

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[2] Citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) ("nude dancing is not without its First Amendment protections from official regulation"); *see also Southeastern Promotions, Ltd. v. Conrad*, 422 U.S. 922 (1975); *California v. LaRue*, 409 U.S. 109 (1972), the Court of Appeals recognized not only the historical aspect, but the extensive judicial attention given the issue as well.

2456, 115 L.Ed.2d 504 (1991). Observing that, although this Court upheld the statute in *Barnes*, "[t]he effect of the Court's plurality holding on our case is not readily apparent."[3] The Court of Appeals then dissected the three opinions that made up this Court's five member majority.

In analyzing Chief Justice Rehnquist's Opinion, the court recognized the conclusion that, "[n]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Id.* at 2460. (Opinion of Rehnquist, C.J.) In determining the "level of protection to be afforded the expressive conduct at issue", the analysis under the four part inquiry of *United States v. O'Brien*, 391 U.S. 367, 377, (1968), was examined.

The first prong of the *O'Brien* test states that the regulation of symbolic conduct is valid if it is within the constitutional power of the Government. No debate is offered to this prong of the test other than the extent to which the other prongs impact this power.

The second prong of the test requires that the statute further an important or substantial government interest. Noting that it was impossible to discern other than from the text of the statute at issue in *Barnes* exactly what governmental interest the Indiana legislators had in mind, the Chief Justice concluded that, "[t]he statute's purpose of protecting societal order and morality is clear." *Barnes*,

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[3] The Court of Appeals explained:

> "Keeping in mind that '[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,'' *Marks v. United States*, 430 U.S. 188, 193, (1977), we examine in greater detail the three opinions that made up the five-member majority." *Id.* at 1159.

111 S.Ct. 2456, 2461 (1991), and that such a purpose furthered a substantial governmental interest. *Id.* at 2462.

As for the third prong, the requirement that the interest to be protected be unrelated to the suppression of free expression, the Court of Appeals recognized that the Chief Justice found that, because the statute did not prohibit nude dancing, but rather all public nudity, the statute was not intended to suppress expression. *Id.* at 2463. The final *O'Brien* requirement, that the restriction on free expression be no greater than is essential to the furtherance of that interest, was found to be satisfied by Indiana's requirements of "pasties and a g-string" as the "bare minimum" necessary to achieve the State's interest.

Summarizing Justice Scalia's concurring Opinion, the court observed, "[t]he challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and *not specifically directed at expression*, it is not subject to First Amendment scrutiny at all." *Id.* (Scalia, J., concurring) (Emphasis added). Because of the conclusion that there was no specific focus toward "expression", no consideration of content-based characteristics was presumably necessary, and the Indiana statute needed only to survive the rational basis test to be valid under the Due Process Clause.

Justice Souter's Opinion was recognized as being in agreement with Chief Justice Rehnquist's Opinion that nude dancing was subject to First Amendment protection, and also agreed that the statute was properly analyzed under *O'Brien*. The Court of Appeals quoted Justice Souter's explanation that his separate opinion was to rest his concurrence not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combatting the *secondary*

effects of adult entertainment establishments of the sort "typified" by the respondents in *Barnes'*.[4]

The Court of Appeals found that the only legally significant difference between the Opinions of the Chief Justice and Justice Souter was the societal interest viewed as sufficient to allow government regulation. According to the plurality, society has a substantial interest in protecting order and morality. According to Justice Souter, morality may not be a substantial government interest, but combating the alleged secondary effects "typified" by adult entertainment establishments was.

The third prong of the *O'Brien* test, content neutrality, was found by the plurality to be met, and the regulation "neutral" because it was aimed at all public nudity rather than only nude dancing. The Court observed that Justice Souter found this prong satisfied because the statute was aimed at secondary effects rather than at nude dancing itself.

After explaining their decisions as to their arrival at what they viewed to be the holding of the Court under the "concurrence in the judgments on the narrowest grounds" basis set forth in *Marks v. United States, supra*, the Court of Appeals specified that, prior to *Barnes*, their decision would have been guided by the secondary effects analysis in *Renton*, and that since Justice Souter's vote was necessary to uphold the statute, the secondary effects test

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[4]The Court of Appeals elaborated on Justice Souter's Opinion by quoting:

> "While it is certainly sound in such circumstances to infer general purposes 'of protecting societal order and morality . . . from [the statute's] text and history,' I think that we need not so limit ourselves in identifying the justification for the legislation here, and may legitimately consider Petitioners' assertion that the statute is applied to nude dancing because such dancing 'encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity." *Barnes*, 111 S.Ct. 2456, 2469 (1991).

was still controlling.[5]

Of critical importance, was the Court of Appeals recognition that a significant distinction between *Barnes* and the *Dollhouse III* case existed in that the *Barnes* statute prohibited all public nudity, regardless of its expressive content. In the Broward County ordinance at issue in this Petition, the preclusive distance and setback provisions apply only to "designated uses" which include the "adult

[5] In analyzing Justice Souter's Opinion, the Court of Appeals was silent as to the Justice's statement that, "I do not believe that a state is required affirmatively to undertake to litigate this issue repeatedly in every case.", or the statement that, "It therefore is no leap to say that live nude dancing of the sort at issue here is likely to provide the same pernicious secondary effects . . ."

In justification of the legislation at issue in *Barnes*, and Justice Souter's use of adverse secondary effects to establish content neutrality, the Court of Appeals did recognize that the Justice felt the broad concern for "social order and morality" did not satisfy *O'Brien*. Justice Souter's Opinion calls for additional consideration. To conclude that adverse secondary effects are "typified" by adult businesses on the basis of two reported cases from the *Barnes'* Circuit (in which prostitution was associated with nude dancing) is a very far reaching concept, which should be scrutinized against this Court's requirement of articulated and validly supported concerns to establish secondary effects as specified in *Schad* and *Renton*. See *Barnes*, 111 S.Ct. 2456, 2470 (1991).

Prejudicial preconceptions regarding the adverse secondary effects of adult entertainment have no place in a valid consideration of important First Amendment freedoms. The social science data does not support such conclusion: "Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youths or adults." (*President's Commission on Obscenity and Pornography*, 1970 Commission Report, Page 139). For an extensive investigation and discussion questioning the widely held cultural belief that the exposure to adult entertainment produces some kind of negative personal or social result, see M. Pally, *Sense and Censorship: The Vanity of Bonfires*, Americans for Constitutional Freedom, 900 Third Avenue, Suite 1600, New York, New York 10022 (1991).

The finding that there is "no leap" to impute the existence of adverse secondary effects to all adult nightclubs is a practice of great concern to Petitioner, particularly when uncontradicted evidence that such secondary effects do not exist at the subject establishment has been repeatedly ignored. Petitioner suggests that this practice is analogous to the designation of a "suspect classification", and therefore improper.

nightclub" involved in this case.[6]

This distinction was emphasized by noting that Justice Scalia, whose vote was also necessary to uphold the statute in *Barnes*, based his analysis on the "general" nature of the statute and specifically noted that "[w]here the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional." *Barnes*, 111 S.Ct. 2456, 2466 (1991) (Scalia, J., concurring) (emphasis original). The Court of Appeals concluded that Justice Scalia's analysis would not apply to the Broward County distance ordinance because the ordinance singled out nude dancing rather than broadly prohibiting all public nudity.

After concluding that *Renton* would control their analysis, the Court of Appeals explained further its decision regarding the basis for review of the Broward County distance ordinance:

> "Relying on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, (1976), which upheld a zoning ordinance that limited the showing of adult films to certain locations,

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[6] Broward County Zoning Code, Article XIII Regulation of Certain Designated Uses, specifies in Section 39-225 Distance limitations between designated uses. These designated uses are defined in Section 39-226.

> "Sec. 39-226. Designated uses.
> The following uses are declared to be 'designated uses':
> (1) Adult bookstore.
> (2) Adult motion picture theater.
> (3) Adult mini motion picture theater.
> (4) Adult nightclub.
> (5) Massage establishment.
> (6) Encounter studio. (Ord. No. 77-48, § 3, 9-16-77; Ord. No. 85-18, § 1, 3-15-86)."

> the Court noted that 'zoning ordinances designated to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral time, place and manner regulations''. *Renton*, 475 U.S. 41, 49. (1986)" 941 F.2d 1157, 1161 (11th Cir. 1991).

In a lengthy footnote, the Court of Appeals responded to the potential complaint that, because they were addressing a regulation of nude dancing, as was the Court in *Barnes*, rather than a regulation of motion pictures, as was the Court in *Renton*, they should apply the *O'Brien* "symbolic conduct" analysis rather than the Court's "time, place and manner" analysis. The Court of Appeals recognized that there has been considerable confusion in this Court's cases as to when each analysis should apply, but went on to say that in recent years this Court has stated several times that, "in the last analysis [the *O'Brien* test] is little, if any, different from the standard applied to time, place, or manner restrictions."[7]

In the final description of the refined analysis used in rendering its decision, the Court of Appeals explained that this Court's time, place, and manner cases generally have required the third element that any challenged

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[7] Citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 3071, 82 L.Ed.2d 221 (1984); *Barnes*, 111 S.Ct., at 2460 (opinion of Rehnquist, C.J.) (noting the similarities and applying *O'Brien*); and *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 2757, 105 L.Ed.2d 661 (1989) (noting the similarities and applying time, place, and manner analysis), the Court of Appeals acknowledged that the wisdom of the trend toward a single standard has been questioned but it was sufficient for their purposes that this Court had determined that under current Court doctrine, the "answer should be the same regardless of which analysis is used." Footnote 2, 941 F.2d, at 1161.

regulation must be narrowly tailored to serve the government interest at issue. It was noted that when the Renton Court enunciated the two-part test of requiring that any challenge regulation serve a substantial government interest and allow for reasonable alternative avenues of communication, it cited authority which addressed the narrow tailoring requirement.[8]

In its unanimous decision, the Court of Appeals concluded that the Broward County distance ordinances furthered a substantial government interest in protecting the quality of urban life from the secondary effects of adult business, were narrowly tailored to serve that interest, and allowed for reasonable alternative avenues of communication.

This decision, recognizing only that the Broward County distance ordinances were "modeled" after the City of Detroit ordinances at issue in *Young v. American Mini Theaters, supra*, conflicts with this Court's Opinions in *Young v. American Mini Theaters* and *City of Renton v. Playtime Theaters, Inc.*, by relaxing and departing from the requirements for validity enumerated therein and conflicts with prior decisions of the federal Courts of Appeals.

By apparently relaxing and departing from the requirements needed to establish secondary effects, the Court of Appeals has created a confusing and dangerous precedent, likely to generate even further confusion among the other Circuits. It severely undermines the presumption of content neutrality vital to the validity of the Broward County distance ordinance at issue herein and any similar

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[8] *Clark v. Community for Creative Non-Violence*, 469 U.S. 288, 293 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). The Court of Appeals also recognized that this Court has required the narrow tailoring element in cases decided after *Renton*, citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); and *Frisby v. Schultz*, 487 U.S. 474 (1988).

federal, state, or municipal legislation.

Under either an analysis pursuant to the four-prong test enunciated in *O'Brien* or an analysis undertaken according to traditional time, place, and manner regulations, the decision of the Court of Appeals is a constitutional question of great nationwide importance and will have far reaching impact on the concept of content neutrality in assessing the validity of the regulation of expressive conduct.

1. The Court of Appeals Conclusion That the Broward County Distance Ordinances Further a Substantial Government Interest Conflicts With This Court's Opinions in *Young* and *Renton*.

The Broward County distance ordinances at issue herein impose distance and setback restrictions only on adult nightclubs. In *Renton*, this Court recognized that a city's interest in protecting the quality of urban life from the secondary effects of adult businesses is indeed substantial. *Renton*, 475 U.S. 41, 50 (1986).

The Broward County distance ordinances prohibit the location of an "adult nightclub" within 500 feet of a residentially zoned district or 1000 feet of a church. There can be no denial that the restrictions imposed by the ordinances are directed specifically at adult entertainment.

The fact that a classification is predicated on the content of material shown in adult establishments can survive a First Amendment challenge only if it can be shown that any applicable regulation or restriction on expressive activity is in no way based on the content of that

expression.[9] There may be no restriction whatsoever on expressive activity because of its content.[10]

In both *Young* and *Renton*, it was stressed that, even though the First Amendment protects communication in this area from total suppression, the state may legitimately use the content of material as the basis for placing designated uses in a different classification from other types of uses, if it can be shown that the regulation is aimed at secondary effects rather than content.

The critical issue then involves to what extent a city must go to to establish secondary effects in order to justify regulation which at first blush would appear content based. In *Young*, it was clear from the record that evidence regarding the existence of secondary effects was considered in the adoption of the City of Detroit ordinances at issue

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[9] "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen v. California*, 402 U.S. 15, 24 (1971); *Street v. New York*, 394 U.S. 576 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964), and cases cited; *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Wood v. Georgia*, 370 U.S. 375, 388-389 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De jonge v. Oregon*, 299 U.S. 353, 365 (1937). To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan, supra*, 376 U.S., at 270." *Young v. American Mini Theatres*, 427 U.S., at 64-65.

[10] The disfavored nature of content-based restrictions seems to be a universally accepted element of American constitutional jurisprudence. *See e.g. Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). For an excellent explanation see Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 Calif. L. Rev. 107, 139-48 (1982), and K. Lasson, *To Stimulate, Provoke, or Incite? Hate Speech and the First Amendment*, Volume 3, Number 1, St. Thomas Law Forum, 49-90 (1991).

therein.[11]

In a normal context, the legislative judgment is to control in cases in which the validity of a particular zoning regulation is "fairly debatable".[12] In a First Amendment context however, additional considerations regarding the "justification" of the exercise of the zoning power are invoked. This Court in *Renton* recognized that the enacting legislative body must have a reasonable basis for its belief that the harm to be protected against in fact exists. *Renton* held that a city need not conduct its own studies to make this determination but certainly suggested that there be some "seed" for such reasonable basis:

> "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence

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[11] In the opinion of urban planners and real estate experts who supported the City of Detroit ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere. In this case, International Eateries offered uncontradicted evidence that Thee Dollhouse III had in fact caused no adverse effect on surrounding property values.

[12] This concept was consistent with the historical development of the then relatively novel concept of land use regulation addressed in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Court broadly sustained the power of local municipalities to impose land use regulations through zoning, but the Court also laid out the general boundaries within which the zoning power must operate: Because one of the characteristics of a free society, as well as the dignity accorded to the rights of private ownership suggested by the Fourteenth Amendment, which provides in part "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .", restrictions upon the free use of private land must find their justifications in "some aspect of the police power, asserted for the public welfare." The legitimacy of any particular zoning restriction must be judged with reference to all the surrounding circumstances and conditions. *Euclid*, 272 U.S. at 377, 388.

> the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. (Emphasis added).

In the case of *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), this Court recognized that the power of local governments to zone and control land use is broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities; however, zoning power is not infinite and unchallengeable and must be exercised within constitutional limits.[13]

Even though the legislation at issue in *Schad* excluded all live entertainment and not just nude dancing, the Court investigated the evidence below which was introduced by the municipality to support the ordinances. Justice Blackmun stated in his concurrence:

> "First, I would emphasize that the presumption of validity that traditionally attends a local government's exercise of its

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[13] When a zoning law such as that at issue herein infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. In *Schneider v. State*, 308 U.S. 147 (1939), for example, this Court recognized its obligation to assess the substantiality of the justification offered for a regulation that significantly impinged on freedom of speech:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of [First Amendment] rights." *Id.* at 161, 60 S.Ct., at 150.

> zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment. In order for a reviewing court to determine whether a zoning restriction that impinges on free speech is 'narrowly drawn [to] further a sufficiently substantial governmental interest," the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision." (Blackmun, J. concurring), 452 U.S., *Id.* at 77.

In addition to this, the case of *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985), specifically cited by the district court in describing the analytical framework utilized in producing the opinion affirmed by the Court of Appeals, held that the goal of controlling the secondary effects of adult entertainment was both legitimate and significant enough to justify regulation, but where fundamental interests such as the right to free speech were at issue more than a "simple articulation" of some legitimate interest was needed.[14]

For such regulation to be valid, the government must show that any articulated concern had more than merely speculative factual grounds and that it was actually a motivating factor in the passage of the legislation. The idea that an ordinance is presumed valid merely because legislators have mimicked another ordinance that has been found constitutional in another context has been soundly rejected by this Court and other Circuit Courts. See *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 69-73, (1981);

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[14] *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975).

Basiardanes v. City of Galveston, 682 F.2d 1203, 1213-14 (5th Cir. 1982); and *Krueger v. City of Pensacola, supra.*

In the instant case, the Court of Appeals stated that the district court found that Broward County "relied on the experiences of the City of Detroit in enacting its ordinances." This is unsupported by the record. The finding of the district court was contained in Footnote 5 of *Dollhouse II* and Paragraph 24 of the Findings of Fact contained in *Dollhouse I*:

> "Although no special zoning studies seem to have been made as a predicate for the adoption of the zoning ordinances, testimony and evidence were adduced that they were modeled after the City of Detroit ordinances." Appendix "B", Pages 6-7 and Appendix "C", Page 11. (Emphasis Added).

In essence, "modeling" is synonymous with "mimicking." By concluding that Broward County's distance ordinances are valid because the experiences of Detroit were relied on in a *Renton* context, the Court of Appeals has dangerously compromised the true holding of *Renton* and issued an Opinion in direct conflict with *Krueger v. City of Pensacola, supra,* and *Basiardanes v. City of Galveston, supra.*

2. The Court of Appeals Conclusion That the Broward County Distance Ordinances are Sufficiently Narrowly Tailored is Invalid Under Either the *O'Brien* Test or a Valid Time, Place, and Manner Regulation Consideration.

As specified in the description of the analytical framework utilized by the Court of Appeals in issuing its Opinion, the court recognized the requirement that legislation such as that at issue herein, since it impacts a fundamental right, must be narrowly tailored.

This Court has long labored in the development of an acceptable analytical framework to test the "narrowly tailored" standard.[15]

Generally speaking, in developing this framework, this Court has examined whether there is a different method of achieving the government's goals that places fewer restrictions on First Amendment freedoms. The "least restrictive means" test is the strictest type of tailoring requirement: in theory, the regulation will be struck down if there is any alternative method of achieving the government's goal that is less intrusive on speech. This concept demands scrutiny by this Court inasmuch as this test, a critical prong of the *O'Brien* test, has been used consistently to assess the constitutionality of similar legislation, but was abandoned by the Court of Appeals in the instant scenario.

The "narrowly tailored" standard, which the Court of Appeals did use, as recently interpreted by this Court, is considerably weaker, requiring only that the means/end fit be good, reasonable, and not an unnecessary intrusion on speech. All tailoring requirements, however, are concerned with the fit between the government end served by the

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[15] See *Grayned v. City of Rockford*, 408 U.S. 104 (1972); Adderley v. Florida, 385 U.S. 39 (1966); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *United States v. O'Brien*, 391 U.S. 367 (1968); and *Schneider v. State*, 308 U.S. 147 (1939) as examples of this labor

regulation and the means used.[16]

This Court, in the case of *Ward v. Rock Against Racism, supra*, held that although a time, place, and manner regulation must be, "narrowly tailored" it need not be the least restrictive means of serving the government's interest. The tailoring requirement is satisfied as long as the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation"[17] and the regulation does not burden substantially more speech than is necessary to further the government's legitimate interest. *Id.* (Emphasis added).

It is precisely at this point that the concepts of content neutrality, the legitimacy of the interests articulated through competent substantial evidence, and the "narrow tailoring" requirement converge and take on a special significance in the instant case. If no legitimately articulated and supported concern over secondary effects can be established, there is no alternative other than to conclude that the legislation is not content neutral.

It should also be noted that any legitimate existence of secondary effects can be successfully and efficiently dealt with through a variety of other means that would have absolutely no impact on First Amendment rights.[18] In

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[16] See *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2758 (1989), and the cogent and probing discussion of consideration of content based regulation and the standards applicable to "content neutral" time, place, and manner regulations contained in: S. Williams, *Content Discrimination and the First Amendment*, 139 U.Pa.L.Rev. 615, 636-54 (1991).

[17] *Id.* at 2758 (quoting *United States v. Albertini*, 472 U.S. 675, 689 [1985]).

[18] In Florida, substantial legislation exists to meet any public health, crime, or other legitimate state interest regarding secondary effects. The legislation contained primarily in Florida Statute Sections 381, 386.01 through 386.051, 384, 120, 775.082, 775.083, 823.01, 823.05, 60.05, and 60.06 (Florida Statutes, 1989) all provide definite remedies for the swift abatement of any adverse secondary effects.

addition to this, International Eateries established through uncontradicted evidence that Thee Dollhouse III had not in fact caused any adverse effects on surrounding property values and that property values had actually increased at a higher rate after the opening of the establishment.

The Court of Appeals flatly rejected this argument, specifically supporting its conclusion by the fact that Broward County had appropriately tailored its distance ordinances to further the substantial government interest (which International Eateries argued was never legitimately articulated in the first place).

Under either a "least restrictive means" test or the more relaxed "narrowly tailored" test,[19] the distance

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A proper respect for the First Amendment would dictate that legislation such as the Broward County ordinances at issue herein must be held to the highest of standards in establishing the true existence and a true concern about secondary effects. It is undeniable that the removal of these secondary effects from the equation leaves only the conclusion that such legislation is content based.

[19] Expanding on the "narrow tailoring" concept, in the instant case, International Eateries availed itself of the waiver provision of the residential distance requirement which provided that the distance requirement "shall" be waived upon presentment of a petition signed by "51 percent of all those persons owning real property, residing or operating or managing a business within five hundred (500) feet of the proposed use." Although International Eateries presented a petition containing the signatures of a majority of those persons owning real property or residing within five hundred (500) feet of Thee Dollhouse III, the County interpreted the ordinance as requiring a majority of all the persons listed in the provision and therefore denied the waiver request.

In an interesting sequence of footnotes discussing the waiver provision, the Court of Appeals stated:

> "4 Of course, a waiver provision that allowed for arbitrary enforcement would be invalid. See *City of Lakewood v. Plain Dealer Publishing, Co.*, 486 U.S. 750, (1988) ('[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.'); see also *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). In this case, however, the waiver provision leaves no room for arbitrary enforcement. It specifically states that a waiver 'shall' be granted

restrictions contained in the Broward County ordinance, as well as distance restrictions contained in other ordinances, would clearly indicate that Broward County and other municipalities are not legitimately addressing the secondary effects concerns properly.[20] It must be stressed that the need for articulating and supporting a reasoned basis for such legislation, when it concerns specific distance measurements and their impact on First Amendment

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upon the presentment of the requisite number of signatures."

The Court of Appeals then interestingly declined to address the use of the term "or" in the provision, logically asserted by International Eateries to indicate that a majority of any of the groups listed in the provision was sufficient to obtain a waiver, because "the interpretation of the County ordinance is purely a matter of state law." 941 F.2d, at 1164.

Blacks Law Dictionary (5th Edition, 1979) defines "Or":

"**Or**, conj. A disjunctive particle used to express an alternative or to give a choice of one among two or more things. . ."

There can be no denial that the waiver provision at issue herein, "allowed for arbitrary enforcement" and, even in light of the Court of Appeals statement in Footnote 4, would be invalid. This Court has unanimously recognized that the lack of procedural specificity and adequate procedural safeguards in legislation dealing specifically with adult entertainment in a First Amendment context is totally unacceptable. See *FW/PBS v. City of Dallas*, 110 S.Ct. 596 (1990). The Court of Appeals failed to recognize this precedent.

[20]Just for example, the Broward County ordinances at issue herein preclude adult businesses within five hundred (500) of a residential district and one thousand (1000) feet of a church. The adult use ordinance in Hillsborough County, Florida imposes a two thousand (2000) foot restriction and setback from both residential and religious uses. The Pinellas County, Florida adult use ordinance imposes a four hundred (400) foot restriction and setback from both residential and religious uses. The Petitioner would submit that these varying distances indicate that municipalities essentially impose the most restrictive regulations and that such legislation is as broadly tailored as possible as municipalities attempt to limit adult businesses in the most restrictive way and hope that any future legal challenge to such legislation does not leave "adequate alternative avenues of communication" (per *O'Brien, Renton*, etc.) concerns that would result in invalidity. The rationale behind this type of legislative action is inconsistent with appropriate respect for the First Amendment.

protected expression must be supported by some type of legitimate evidence.

As stated in Footnote 17, International Eateries availed itself of the waiver provision of the subject ordinance. The waiver provision was challenged by International Eateries again because it was not "narrowly tailored". The Court of Appeals was unpersuaded by the argument, stating that no authority indicating that the County was required to provide a waiver opportunity was presented. This would again invoke a consideration of the "narrow tailoring" requirement and International Eateries position that no sufficient justification for why the distance requirement of 1000 feet from a church needed to be twice that of the 500 foot residential requirements. Citing the *Walnut Properties, Inc. v. City of Whittier* cases,[21] the Court of Appeals again indirectly emphasized the need for an "articulated and supported basis" by quoting:

> "[T]he City's interest in preventing urban blight and downgrading of residential and commercial properties might logically support the ordinance's requirement that adult businesses by 1000 feet apart, but it might not support the requirement that they be 1,000 feet from a church. *Walnut Properties*, 808 F.2d, at 1335." Appendix "A", Page 19.

The Court of Appeals apparently misinterpreted International Eateries argument. The concern was not that the *Walnut Properties* case stood for the proposition that a

[21] *Walnut Properties, Inc. v. City of Whittier*, 762 F.2d 1020 (9th Cir. 1985); *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331 (9th Cir. 1987); and *City of Whittier v. Walnut Properties, Inc.*, 475 U.S. 1042 (1986).

1000 foot church distance ordinance was excessive, but that evidence concerning sufficient alternative avenues and other evidence, again legitimately articulating and supporting such distance regulations regardless of the specific preclusive distance contained therein, was necessary for constitutional validity.

This Court, which has so zealously protected the rights of the minority and the unpopular to free expression for so many years, cannot allow the Opinion of the Court of Appeals in this case to stand. The Court has clearly specified the requirements regarding the articulation, demonstration and support of the existence of adverse secondary effects to infer "content neutrality" in classifications that are otherwise content based. In the instant case, there is nothing in the record to indicate that the Broward County distance ordinances were anything more than "modeled" after the City of Detroit ordinances.

The decision below upholding the Broward County ordinances stands for two very dangerous propositions:

(1) A First Amendment protected activity can be regulated with virtually no evidence of the need for such regulation; and

(2) Content based regulation is acceptable despite the fact that the evidence needed to establish the existence of content neutrality is never articulated, presented, or supported.

In conclusion, this Court should grant review to ensure the appropriate application of its prior decisions, to eliminate conflict among the various Circuit Courts, and to address a constitutional question of nationwide importance.

Respectfully submitted,

DATED January 14, 1992

Luke Charles Lirot
Counsel for Petitioner

91-1168
(2)

Supreme Court, U.S.
FILED
JAN 14 1992
OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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INTERNATIONAL EATERIES OF AMERICA, INC.

Petitioner,

v.

BROWARD COUNTY, FLORIDA

Respondent.

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

VOLUME I OF II

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APPENDIX A

INTERNATIONAL EATERIES OF AMERICA, INC.,

Plaintiff-Appellant,

v.

BROWARD COUNTY, FLORIDA,

Defendant-Appellee.

No. 90-5076

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

941 F.2d 1157; 1991 U.S. App. LEXIS 21303

September 12, 1991

SUBSEQUENT HISTORY: As Amended.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Southern District of Florida. No. 88-6472-CIV-SMA; Sidney M. Aronovitz, Judge.

DISPOSITION: Affirmed.

COUNSEL: ATTORNEYS FOR PLAINTIFF-APPELLANT: Richard L. Wilson, Orlando, Florida.

ATTORNEYS FOR DEFENDANT-APPELLEE: Tracy Lautenschlager, Ft. Lauderdale, Florida.

JUDGES: Kravitch and Cox, Circuit Judges, and Henderson, Senior Circuit Judge.

OPINIONBY: KRAVITCH

OPINION: [*1158] KRAVITCH, Circuit Judge

Appellant International Eateries of America, Inc. challenges Broward County, Florida's adult entertainment zoning ordinances as violative of the first amendment. Because we hold that the ordinances satisfy the standard set out by the Supreme Court in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), we reject International Eateries' challenge and affirm the decision of the district court.

I

International Eateries operates a nightclub known as "Thee Dollhouse III" in unincorporated Broward County, Florida. The parties have stipulated that the primary form of entertainment at Thee Dollhouse III is non-obscene nude dancing. In April 1986, appellee Broward County served two notices of violation upon International Eateries, informing it that Thee Dollhouse III was operating in violation of several Broward County zoning ordinances. The first notice stated that Thee Dollhouse III was in violation of the County's distance ordinances, [**2] which prohibit the location of adult nightclubs within 500 feet of a residential district and 1000 feet of a church. The second notice stated that Thee Dollhouse III was in violation of the County's special uses ordinances, which permit operation of adult nightclubs only within a special zoning district. It is undisputed that Thee Dollhouse III is within 500 feet of a residential district and

that three residential properties are less than 500 feet away. It is also undisputed that a church is located approximately 885 feet from Thee Dollhouse III. Finally, it is undisputed that Thee Dollhouse III is not within the special uses zoning district.

International Eateries filed an action in federal district court seeking to enjoin the County from enforcing the ordinances. The district court stayed the proceedings until International Eateries had pursued administrative remedies with the County. International Eateries then applied to the County for a rezoning of the property and to the County Board of Adjustment for a variance from the distance requirements. The County denied the application for rezoning and therefore had no reason to act on the variance application.

In its first opinion, [**3] International Eateries v. Broward County, 726 F.Supp. 1556 (S.D.Fla.1987) ("Dollhouse I"), the district court held that the special uses ordinances as applied to International Eateries violated the first amendment because the ordinances did not advance a substantial government interest and did not leave available alternative channels for International Eateries to conduct its business. Dollhouse I, 726 F.Supp. at 1566-67. As for the distance ordinances, the court held that they were not unconstitutional on their face, and that International Eateries' as-applied challenge was premature because the County had not yet ruled on the application for a variance. Id. at 1563-64.

International Eateries then filed a petition with the County's Building and Zoning Enforcement Division, seeking an automatic waiver of the 500-foot residential district prohibition. That ordinance states that the 500-foot

requirement shall be waived upon presentment of "a written petition requesting the waiver, signed by 51 percent of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed location [**4] of the designated use." International Eateries' petition contained the names of eight persons residing or owning property in the residential district. Although this was a majority of the owners and residents of the [*1159] area, the County denied the petition because it interpreted the ordinance as also requiring signatures of operators and managers of businesses within the area. International Eateries also requested waivers of the distance ordinances from the County's Planning and Zoning Board and from the County Commission, but these requests were denied.

In June 1988, International Eateries again filed an action in district court seeking to enjoin enforcement of the distance ordinances. The district court again denied relief, this time finding the ordinances valid as applied. International Eateries v. Broward County, 726 F.Supp. 1568 (S.D. Fla. 1989) ("Dollhouse II"). International Eateries now appeals the district court's decision in Dollhouse II.

II

The regulation of non-obscene n1 nude dancing often has been addressed in the federal courts. On several occasions, the Supreme Court has assumed, without deciding, that nude dancing is protected expression under [**5] the First Amendment. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66, 101 S. Ct. 2176, 2181, 68 L. Ed. 2d 671 (1981) ("nude dancing is not without its First Amendment protections from official regulation"); see

also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975); Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975); California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972). In a related context, the Supreme Court has held that under some circumstances cities may enact zoning ordinances that require adult movie theatres to locate only in certain areas, provided that the purpose of the regulation is to control the "secondary effects" of these businesses. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976). These [**6] cases have been applied by the lower federal courts to the regulation of nude dancing. See, e.g., International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986); SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988); Envy Ltd. v. City of Louisville, 734 F. Supp. 785 (W.D. Ky. 1990).

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n1 Obscenity is not protected by the first amendment, see Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and is not at issue in this case.

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A

This term, the Supreme Court squarely addressed the protection afforded to nude dancing under the First

Amendment. In Barnes v. Glen Theatre, Inc., U.S. , 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991), respondents sought to enjoin enforcement of Indiana's public indecency statute. Respondents contended that the statute, which prohibited "appear[ing] in a state of nudity" in a public place, was invalid as applied [**7] to the nude dancing performed at two establishments. Although the Court upheld the statute, the effect of the Court's plurality holding on our case is not readily apparent. Keeping in mind that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,'" Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977), we examine in greater detail the three opinions that made up the five-member majority.

Chief Justice Rehnquist, writing for Justices O'Connor and Kennedy, began his analysis by noting that the statements in Schad, Doran, and LaRue discussed above "support the conclusion of the Court of Appeals that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." Id. at 2460 (opinion of Rehnquist, C.J.). In order to determine "the level of protection to be afforded to the expressive conduct at issue," [**8] the opinion analyzed the statute under the four-part inquiry of United States v. O'Brien, [*1160] 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed. 2d 672 (1968), the framework applied to symbolic speech. The second prong of that test requires that the statute further an important or substantial government interest. Although the Chief Justice's opinion noted that "it is impossible to discern, other than from the text of the

statute, exactly what governmental interest the Indiana legislators had in mind," the opinion nevertheless concluded that "the statute's purpose of protecting societal order and morality is clear," Barnes, 111 S. Ct. at 2461, and that such a purpose furthers a substantial governmental interest. Id. at 2462.

O'Brien's third prong requires that the interest to be protected is unrelated to the suppression of free expression. Here, the opinion stated that because the statute did not prohibit nude dancing, but rather all public nudity, the statute was not intended to suppress expression. Id. 111 S. Ct. at 2463. Finally, O'Brien requires [**9] that the restriction on free expression be no greater than is essential to the furtherance of that interest. Here, Chief Justice Rehnquist concluded that Indiana's requirement of pasties and a G-string was the "bare minimum" necessary to achieve the state's interest. Id.

Justice Scalia concurred in the judgment, but not the reasoning, of the plurality. According to Justice Scalia, "the challenged regulation must be upheld, not because it survives some lower level of First-Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First-Amendment scrutiny at all." Id. (Scalia, J., concurring). Because the statute was not covered by the First Amendment, it only needed to survive rational-basis review to be valid under the Due Process Clause -- a test that was easily met according to Justice Scalia. Id. 111 S. Ct. at 2468.

Justice Souter, the fifth Justice to uphold the statute, agreed with Chief Justice Rehnquist's opinion that nude dancing is subject to First Amendment protection, and also

agreed that the statute should be analyzed under O'Brien.

He further stated, [**10] however, that "I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments." Id. 111 S. Ct. at 2468 (Souter, J., concurring) (emphasis added). Justice Souter explained his difference with the plurality as follows:

It is, of course, true that this justification has not been articulated by Indiana's legislature or by its courts. As the plurality observes, "Indiana does not record legislative history, and the state's highest court has not shed additional light on the statute's purpose." While it is certainly sound in such circumstances to infer general purposes "of protecting societal order and morality . . . from [the statute's] text and history," I think that we need not so limit ourselves in identifying the justification for the legislation here, and may legitimately consider petitioners' assertion that the statute is applied to nude dancing because such dancing "encourages prostitution, [**11] increases sexual assaults, and attract[s] other criminal activity." Id. at 2469 (ellipses and brackets original, citations omitted).

The only legally significant difference between the opinions of the Chief Justice and of Justice Souter is the societal interest viewed as sufficient to allow the government regulation. Thus, in applying the second prong of O'Brien -- furtherance of a substantial government interest -- according to the plurality, society has a substantial interest in protecting order and morality; according to Justice Souter, morality may not be a

substantial government interest, but combatting the secondary effects of adult entertainment establishments is.

As for the third prong, content neutrality, the plurality found that the statute was neutral because it was aimed at all public nudity, rather than only nude dancing; Justice Souter found this prong satisfied because the statute is aimed at secondary effects, rather than at nude dancing itself.

[*1161] Prior to Barnes, our decision would have been guided by the secondary-effects analysis of Renton, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). [**12] Having examined the opinions in Barnes, we conclude, for two reasons, that this is still the case. First, Justice Souter, whose vote was necessary to uphold the statute, stated that morality justifications were not a substantial government interest, but that control of secondary effects did constitute such an interest. Thus, in order to uphold a statute regulating nude dancing, it is still necessary after Barnes that the statute meet the secondary effects test of Renton.

Second, the statute at issue in Barnes and the ordinance at issue in this case are different in a significant respect. In Barnes, the statute prohibited all public nudity, regardless of its expressive content. Here, Broward County's distance ordinances only apply to "designated uses," which include the "adult nightclub" involved in this case. Justice Scalia, whose vote was also necessary to uphold the statute in Barnes, based his analysis on the "general" nature of the statute and specifically noted that "where the government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional." Barnes, 111 S. Ct. at 2466 [**13] (Scalia, J., concurring) (emphasis original). Thus, Justice

Scalia's analysis would not apply to a statute like the one in this case that singles out nude dancing rather than broadly prohibiting all public nudity.

Although this discussion does not explain how the Supreme Court would rule in the instant case, it does make clear that the judgment reached by a majority of the Justices in Barnes does not directly govern our case. This being so, we conclude that Renton still controls our analysis.

B

In Renton, the Supreme Court addressed the validity of an ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Relying on Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976), which upheld a zoning ordinance that limited the showing of adult films to certain locations, the Court noted that "zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." [**14] Renton, 475 U.S. at 49, 106 S. Ct. at 929-30. The Court stated that the inquiry, therefore, was whether "the ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." Id. at 50, 106 S. Ct. at 930. n2

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n2 It might be argued that because we are addressing a regulation of nude dancing, as was the Court in Barnes, rather than a regulation of motion pictures, as

was the Court in Renton, we should apply the O'Brien "symbolic conduct" analysis rather than the Court's "time, place, and manner" analysis. In O'Brien, the Court stated that a statute regulating symbolic conduct was valid if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377, 88 S. Ct. at 1679.

There has been considerable confusion in the Court's cases as to when each analysis should apply. In recent years, however, the Court has stated several times that "in the last analysis [the O'Brien test] is little, if any, different from the standard applied to time, place, or manner restrictions." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298, 104 S. Ct. 3065, 3071, 82 L. Ed. 2d 221 (1984); see also Barnes, 111 S. Ct. at 2460 (opinion of Rehnquist, C.J.) (noting the similarities and applying O'Brien); Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 2757, 105 L. Ed. 2d 661 (1989) (noting the similarities and applying time, place, and manner analysis). Although the wisdom of this trend toward a single standard has been questioned, see S. Williams, Content Discrimination and the First Amendment, 139 U.Pa.L.Rev. 615, 636-54 (1991), it is sufficient for our purposes that the Supreme Court has determined that under current Court doctrine the answer should be the same regardless of which analysis is used. Because we conclude that the ordinance at issue in this case more closely resembles the ordinance in Renton than the statute in Barnes, we follow Renton and apply time, place,

and manner analysis.

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[**15]

Before applying this test, we note that although the Court in Renton stated the [*1162] inquiry as containing two elements (serving a substantial government interest and allowing for reasonable alternative avenues of communication), the Court's time, place, and manner cases generally have required a third element: the regulation must be narrowly tailored to serve the government interest at issue. In fact, when the Renton Court enunciated the test as containing two parts, it cited two cases, both of which addressed the narrow-tailoring requirement. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293-96, 104 S. Ct. 3065, 3069-70, 82 L. Ed. 2d 221 (1984); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654, 101 S. Ct. 2559, 2567, 69 L. Ed. 2d 298 (1981). Moreover, the Court has required the narrow-tailoring element in cases decided after Renton. See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 2756-60, 105 L. Ed. 2d 661 (1989); Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 2502-04, 101 L. Ed. 2d 420 (1988). [**16] Finally, although the Renton Court did not specifically include narrow tailoring in its formulation of the standard to be applied, the Court later examined "the method chosen by Renton to further its substantial interests," and found that that method was "narrowly tailored" to further the government interest in that case. Renton, 475 U.S. at 52, 106 S. Ct. at 931. Thus we do not believe that the Renton Court intended to eliminate the narrow-tailoring requirement from time, place, and manner analysis, and we therefore consider that requirement in our

analysis below.

III

A

We first address whether Broward County's ordinances further a substantial government interest. In Renton, the Court recognized that a city's interest in protecting the quality of urban life from the secondary effects of adult businesses is indeed substantial. Renton, 475 U.S. at 50, 106 S. Ct. at 930. The distance ordinances prohibit the location of an "adult nightclub" within 500 feet of a residentially zoned district or 1000 feet of a church. The ordinances also specifically state that certain businesses have a "deleterious [**17] effect" on the residential and business areas around them and that the purpose of the ordinance is to "ensure that these adverse effects will not contribute to the blighting and downgrading of the surrounding neighborhood." Thus, the ordinances are aimed at the very type of harm that the Renton Court found to create a substantial government interest. n3

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S. Ct. at 927. Because Justice Souter wrote only for himself in Barnes, we continue to follow the Renton Court's approach of gleaning the government interest at stake from the ordinance itself rather than implying one where none is evident in the ordinance.

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[**18]

The Renton Court also recognized, however, that the enacting body must have a reasonable basis for its belief that the harm to be protected against in fact exists. The city need not conduct its own studies to make this determination. According to the Court:

The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. Id. at 51-52, 106 S. Ct. at 931. Here, the district court found that Broward County relied on the experiences of Detroit in enacting its ordinances. Detroit's distance ordinances were upheld in Young v. American Mini Theatres. International Eateries [*1163] argues, however, that because the County's ordinances were not modeled exactly after those of Detroit, Detroit's studies should not suffice to justify the County's ordinances. The Supreme Court answered this argument in Renton:

Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater [**19] zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of

adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton. Renton, 475 U.S. at 52, 106 S. Ct. at 931. We therefore conclude that Broward County's distance ordinances further a substantial government interest.

B

We next address whether the distance ordinances are narrowly tailored to further the County's interest in combatting the secondary effects of adult entertainment establishments. In Renton, the Court stated that the ordinance was narrowly tailored because it affected "only that category of theaters shown to produce the unwanted secondary effects. . . ." Renton, 475 U.S. at 52, 106 S. Ct. at 931. Here, the ordinances are of a similarly limited scope, focusing only on those businesses likely to produce secondary effects.

International Eateries argues, however, that there is no indication that a single nude dancing establishment causes deterioration of the surrounding area. According [**20] to International Eateries, the ordinances are designed to prevent the concentration of such establishments. While it is true that the ordinances prohibit the location of an adult nightclub within 1,000 feet of another adult business, the ordinances are not only concerned with concentrations of adult establishments. The ordinances separately prohibit adult businesses from locating near other uses such as residential areas, churches, and schools. The County obviously determined that even a single adult business could have deleterious effects on these property uses. So long as the distance requirements are not greater than necessary to prevent the secondary

effects, they are narrowly tailored to serve their purpose. In this case, the distances required by the ordinances are no farther than those approved by the Court in Renton; thus we cannot say the requirements are not narrowly tailored.

International Eateries further argues that there is uncontradicted evidence in the record that Thee Dollhouse III has not in fact caused any adverse effects on surrounding property values and that property values have actually increased at a higher rate than before the opening of Thee Dollhouse [**21] III. This argument holds no weight. As discussed above, Broward County appropriately tailored its distance ordinances to further its substantial government interest. If the decision was valid ex ante, International Eateries cannot justify violating the ordinances by showing that they were unwise ex post.

International Eateries also challenges the waiver provision of the residential distance requirement. That provision allows the residential distance requirement to be waived upon presentment of a petition signed by "51 percent of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed use." Although International Eateries presented a petition containing the signatures of a majority of those persons owning real property or residing within 500 feet of Thee Dollhouse III, the County interpreted the ordinance as requiring a majority of all the persons listed in the provision and therefore denied the waiver request.

International Eateries contends that the waiver provision is not narrowly tailored because the ordinance is designed to protect property values of residents, yet it allows businesses to block a waiver. International [**22] Eateries notes that if residential property was not located in the vicinity, those businesses would have no right to object

to the location of the establishment. Thus, according to appellant, it is absurd to allow an unprotected group to thwart the [*1164] waiver when a majority of the very group the ordinance was designed to protect has given its consent.

We are unpersuaded by this argument. First, appellant has pointed to no authority indicating that the County is even required to provide a waiver opportunity. The Court in Renton upheld similar distance requirements and made no mention of any opportunity for a party to have the requirements waived. Also, the other ordinance at issue in this case, the church distance requirement, does not have a waiver provision, and International Eateries has not argued that one is required. Thus, we fail to see how a valid distance requirement can become invalid by adding an opportunity, albeit a difficult one to meet, for the requirement to be waived. n4 Moreover, the fact that the ordinance prohibits adult entertainment within 500 feet of a residential area does not mean that the ordinance is concerned only with residents. The ordinance specifically [**23] addresses the secondary effects of adult businesses "upon the adjacent business and residential areas" (emphasis added). Certain businesses are more likely to locate near residential areas than are other businesses, and those businesses may be more likely to be injured by the proximity of adult entertainment. The County was entitled to take this into account. n5

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n4 Of course, a waiver provision that allowed for arbitrary enforcement would be invalid. See City of Lakewood v. Plain Dealer Publishing, Co., 486 U.S. 750, 108 S. Ct. 2138, 2143, 100 L. Ed. 2d 771 (1988) ("In the

area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."); see also Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51, 89 S. Ct. 935, 938, 22 L. Ed. 2d 162 (1969). In this case, however, the waiver provision leaves no room for arbitrary enforcement. It specifically states that a waiver "shall" be granted upon the presentment of the requisite number of signatures. [**24]

n5 International Eateries also argues that the County improperly interpreted the waiver provision. According to International Eateries, the use of the term "or" in the provision indicates that a majority of any of the groups listed in the provision is sufficient to obtain a waiver. We have no power to decide this issue. The interpretation of the County ordinance is purely a matter of state law. So long as the County applies the ordinance consistently, we are empowered only to determine whether that interpretation withstands constitutional scrutiny. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65, 101 S. Ct. 2176, 2181, 68 L. Ed. 2d 671 (1981); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 643, 101 S. Ct. 2559, 2562, 69 L. Ed. 2d 298 (1981); G. Gunther, Constitutional Law 1153 n. 11 (11th ed. 1985).

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Finally, International Eateries argues that the church distance ordinance is not narrowly tailored because it has a distance requirement of 1,000 feet, and the County has not provided [**25] a sufficient justification for why the requirement needs to be twice the distance of the 500-foot

residential requirement. International Eateries points to Walnut Properties, Inc. v. City of Whittier, 808 F.2d 1331 (9th Cir. 1987), to support its argument. That opinion arose out of a dispute involving an ordinance, like the one at issue in this case, that prohibited the location of an adult business within 1,000 feet of a church. The district court originally held that the ordinance was invalid, and the Ninth Circuit affirmed. Walnut Properties, Inc. v. City of Whittier, 762 F.2d 1020 (9th Cir. 1985). The Supreme Court, however, issued its opinion in Renton shortly thereafter and then remanded the case for reconsideration in light of Renton. City of Whittier v. Walnut Properties, Inc., 475 U.S. 1042, 106 S. Ct. 1255, 89 L. Ed. 2d 566 (1986). The opinion cited by International Eateries was the order by the Ninth Circuit remanding the case to the district court. In its instructions to the district court, the court stated: "The City's interest in preventing urban blight and downgrading of residential and [**26] commercial properties might logically support the ordinance's requirement that adult businesses be 1,000 feet apart, but it might not support the requirement that they be 1,000 feet from a church." Walnut Properties, 808 F.2d at 1335. This statement was merely one of several comments made by the court to guide the district court's analysis. The court was not ruling on the church distance [*1165] requirement. After remand to the district court, the district court again held the ordinance invalid, and the Ninth Circuit affirmed. Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1107-10 (9th Cir. 1988), cert. denied, 490 U.S. 1006, 109 S. Ct. 1641, 104 L. Ed. 2d 157 (1989). The appellate court specifically limited its holding, stating that it was based entirely on the fact that there were not adequate alternative locations in the city for adult businesses. Id. Thus, contrary to International Eateries' assertion, the case does not stand for

the proposition that a 1,000-foot church distance ordinance is excessive. Rather, the case simply follows the Renton analysis, holding that where there are not [**27] sufficient alternative locations, an ordinance zoning adult businesses is invalid. We therefore hold that in this case the ordinances are narrowly tailored to serve their purpose.

C

Finally, unlike the ordinance in Walnut Properties, the Broward County ordinances allow for reasonable alternative avenues of communication. It is undisputed that there are twenty-six other sites in unincorporated Broward County where International Eateries could locate an adult entertainment establishment without violating the distance ordinances. International Eateries does not argue that the ordinances are invalid in this respect.

IV

In view of the above discussion, we hold that the Broward County distance ordinances are valid under the Supreme Court's analysis in Renton.

AFFIRMED.

APPENDIX B

INTERNATIONAL EATERIES OF AMERICA, INC., a Florida corporation, d/b/a "Thee Dollhouse III",

Plaintiff,

v.

BROWARD COUNTY, a political subdivision of the State of Florida,

Defendant.

Case No. 88-6472-Civ

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

726 F. Supp. 1568; 1989 U.S. Dist. LEXIS 15238

December 15, 1989, Decided

COUNSEL: [**1]

Law Office of BRUCE L. RANDALL, Ft. Lauderdale, Florida, ATTORNEY FOR PLAINTIFF.

BARBARA A. HALL, ESQUIRE, Assistant County Attorney, Ft. Lauderdale, Florida, ATTORNEY FOR DEFENDANT.

JUDGES: Sidney M. Aronvitz, United States District Judge.

OPINIONBY: ARONOVITZ

OPINION: [*1570] MEMORANDUM OPINION CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW

SIDNEY M. ARONOVITZ, UNITED STATES DISTRICT JUDGE

THIS CAUSE was tried non-jury before the Court at which time testimony and evidence were adduced by both parties. Also, by stipulation and agreement, the parties agreed that the prior record and all exhibits in the earlier related action which included the same parties, that case being 86-6348-Civ-Aronovitz (hereinafter referred to as Dollhouse I), be taken into consideration by this Court through judicial notice, including the Final Judgment and Memorandum Opinion of this Court in that case. (See also Paragraph Number 4 of the Joint Pre-Trial Stipulation.) Likewise, in the course of the earlier case, this Court upon plaintiff's motion, visited the location and the surrounding area of the subject property involved in this litigation in the company of counsel for both sides, and viewed in open Court, a video tape presented by plaintiff of the surrounding area. Additionally, at the trial of this [**2] action (hereinafter referred to as Dollhouse II), further evidence was adduced and received beyond that offered in Dollhouse I. The Court has considered all the evidence, oral argument, memoranda of law, the viewing of the location, and being otherwise fully advised in the premises, makes and enters herewith its Findings of Fact and Conclusions of Law.

Nature of Prior Proceedings and Relationship Hereto

Dollhouse I raised two separate and independent issues; namely,

(1.) -- Whether the "special uses" ordinances applicable to adult nightclubs was Constitutional as applied to the location of Thee Dollhouse III in preventing its use in presenting non-obscene, nude dancing as the primary form of entertainment for its customers; and
(2.) -- Whether or not the distance ordinances prohibiting the location of such use within 500 feet of a residentially-zoned district or within one thousand (1,000) feet of a church, kindergarten, nursery, elementary, middle or high school or day care center were either facially or otherwise unconstitutional.

Dollhouse I is a published opinion found under the title and citation: International Eateries of America, Inc., a Florida corporation, d/b/a "Thee [**3] Dollhouse III" v. Broward County, a political subdivision of the State of Florida, 726 F.Supp. 1568 [*1571] S.D. Fla. 1989), and is also found as a part of the record in this case. That Memorandum Opinion and the Final Judgment issued thereon are made a part of these proceedings by agreement of the parties and judicial notice thereof is taken by this Court. Therein, this Court found that the special uses ordinance was unconstitutional as applied to this plaintiff because there was only one location in all of Broward County, Florida already zoned B-2B, and without an application for permission to the Broward Zoning Board and the Broward County Commission no location could be utilized for the designated use. However, in that same opinion, this Court found that both the distance ordinances as to churches, schools, etc., and residential districts are facially valid. n1

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n1 At the time Dollhouse I was before the Court, the

plaintiff had applied for zoning variances to Broward County from both the "special uses" ordinances and the "distance requirements" ordinances. Broward County denied the special uses and therefore considered the application for the distance requirements as moot and did not rule thereon. As noted herein, this Court later found the special uses ordinances Unconstitutional as applied and thereupon, plaintiff reapplied for a ruling with regard to the variance and distance requirements. Therefore, technically, that ruling of facial invalidity was not then timely. Hence it is revisited here.

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[**4]

Now in this action (Dollhouse II), the plaintiff first applied to Broward County Zoning Board and County Commission for a variance from the distance requirements and having been denied same, seeks again to attack the facial and applied Constitutionality of the distance ordinances, arguing:

A) that the provision of the ordinance permitting a waiver from the residential distance prohibition and

B) the provision requiring a one thousand (1,000) foot separation between an adult business and a church, school, etc., are an invalid prior restraint, unconstitutionally vague and overbroad, and a substantial restriction of First Amendment Rights. Among other defenses, defendant asserts that the Constitutionality of the distance ordinances has already been decided in Dollhouse I and therefore the issues raised herein are res judicata.

Basis of Federal Jurisdiction

This complaint for permanent injunction, declaratory judgment and attorney's fees is brought pursuant to 42 U.S.C. @@ 1983 and 1988. Jurisdiction is founded upon 28 U.S.C. @@ 1331 and 1343.

FINDINGS OF FACT

Some of the following Findings of Fact contained in Dollhouse I are still pertinent and relevant hereto, and [**5] others are based on the evidence heard in this case.

1. Plaintiff, International Eateries of America, Inc., a Florida corporation, operates a restaurant and nightclub at 3561 North Federal Highway in unincorporated Broward County, Florida, known as "Thee Dollhouse III. Thee Dollhouse III presents non-obscene, nude dancing as the primary form of entertainment for its customers.

2. Defendant Broward County has a population in excess of one million persons, and occupies more than 410 square miles on Florida's southeast coast, with the city of Fort Lauderdale being the County seat. Within the unincorporated area of Broward County, which is involved in this litigation, there are approximately 150 square miles.

3. Thee Dollhouse III presents non-obscene, nude dancing as the primary form of entertainment for its patrons (the parties have so stipulated at paragraph 5a of the Joint Pretrial Stipulation), previously incorporated herein as Finding of Fact paragraph number 1. The County never submitted evidence to the Court as to the nature or type of nude entertainment, nor whether it was lewd or lascivious, nor any description of the nature or type of dancing. The parties have agreed that [**6] under the ordinances in

effect, the entertainment at Thee Dollhouse III is "non-obscene, nude dancing." Therefore, no finding of fact is made herein with regard to the exact nature or type of nude dancing. This same finding still pertains to the instant proceeding. [*1572]

4. Additionally, neither party has chosen to introduce any factual matter or issue of law relating to the applicability or non-applicability of the dispensing of alcoholic beverages and what effect, if any, under the Twenty-First Amendment this might or could have upon the rights of the County to exercise some zoning restraint under its police power. Therefore, again, there is no finding of fact made herein or conclusion of law premised upon the aforegoing, since the parties both seemingly do not consider it relevant and have not presented it to the Court as a matter to be determined. n2 This same finding still pertains to the instant case.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - -

n2 Cf. International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986) (remanding to district court to consider, among other things, the Twenty-First Amendment issue, where the ordinance in question specifically related to establishments that both served alcoholic beverages and provided nude entertainment).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - -

[**7]

5. Although no special zoning studies seem to have been made as a predicate for the adoption of the zoning

ordinances, testimony and evidence were adduced that they are modeled after the City of Detroit ordinances.

6. Thee Dollhouse III is located within 1,000 feet of a church, the Kingdom Hall of Jehovah's Witnesses, at 3765 N.E. 18th Terrace. The two buildings are approximately 885 feet apart. The business is also located within 500 feet of a residential district to the east, in the incorporated municipality of Lighthouse Point. There are three residential properties within 500 feet of the nightclub. As to one of those properties, only a portion of the backyard is within 500 feet of Thee Dollhouse III. As to the other two, the buildings themselves are within 500 feet.

7. On December 15, 1987 Thee Dollhouse III filed a petition with the County's Building and Zoning Enforcement Division seeking an automatic waiver of the 500 foot residential district prohibition, pursuant to Section 39-225(b). That provision reads:

> It shall be unlawful hereafter to establish any designated use within unincorporated Broward County if the proposed location is within 500 feet of a residentially zoned [**8] district. This prohibition shall be waived upon the presentment to the building and zoning enforcement division of a written petition requesting such waiver, signed by 51 percent of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed location of the designated use. The circulator of the petition requesting a waiver shall subscribe and swear to an affidavit attached to the petition that the circulator personally witnessed the signatures on the petition and that the signatures were affixed to the petition by the persons whose names appear on the petition. Said petition shall bear at the top of each page thereof a

typewritten title in substantially the following form:

> "The undersigned hereby request a waiver from the Building and Zoning Enforcement Division of Broward County, Florida, that shall permit the establishment and location of a (an) (state specifically which designated use is sought to be established) within 500 feet of my real property, residence or business."

Building and zoning enforcement division shall carefully investigate the petition and signatures on the petition to verify that the petitioners do [**9] in fact own real property, or reside or do business in a residentially zoned district within 500 feet of the proposed designated use. Measurement of the 500 feet shall be made in accordance with subsection (c) hereof.

8. The petition filed by plaintiff contained the signatures of more than 51% of those persons residing, and owning residential real property, within 500 feet of Thee Dollhouse III, but did not contain signatures of any persons operating or managing a business, or owning commercial real property, within 500 feet. The petition was rejected by the County because it did not contain any signatures from the latter group. Plaintiff then requested a waiver of the distance restrictions [*1573] from the County's Planning and Zoning Board and it was denied. The Broward County Commission likewise denied the waiver of distance restrictions.

9. The petition contained the signatures of the two owners of a duplex, and six signatures of residents of that duplex. The two owners were Michael J. Peter, an owner

of International Eateries of America, Inc. and Centerline Associates, Inc., whose president is James Williams. James Williams circulated the petition and also signed the petition as president [**10] of Centerline Associates, Inc. Centerline Associates, Inc. is a company which does construction and maintenance work for plaintiff and for Michael J. Peter. All of the residents of the duplex who signed the petition were current or previous employees at Thee Dollhouse III.

10. Said duplex was purchased in June or July of 1987 for $ 125,000.00 and sold in January of 1989 for $ 125,000.00.

11. The petition, which was signed by eight people, did not include any signatures of owners or residents of the second duplex apartment, nor did it include any signatures of owners of property within 500 feet of Thee Dollhouse III on which businesses operate, or signatures of operators or managers of those businesses. Shirley Maurer, Chief Zoning Inspector for Broward County, testified that she received the petition from plaintiff and that she knew there to be many more than 15 persons in the group or universe of potential signators. Ms. Maurer's knowledge of the businesses in the area of Thee Dollhouse III was based on her review of zoning certificates in the area which her office maintains for businesses operating in unincorporated Broward County. The petition was rejected by Broward County on [**11] or about December 22, 1987, because it did not contain the required signatures.

12. The waiver provision of Section 39-225(b) has been interpreted by Broward County Building and Zoning Enforcement Division to require signatures of 51% of a set of persons which includes all owners of property

within 500 feet and all residents or business operators or business managers within 500 feet. Shirley Maurer testified that the provision had been interpreted and applied the same way to other petitions and that waivers had been granted based upon such petitions.

13. Plaintiff applied to the Broward County Board of adjustment for a variance from the 1,000 foot and 500 foot distance requirements. Shirley Maurer testified that the standards considered by the Board of Adjustment in granting or denying variances are:

a) whether special conditions exist on the property which do not exist on other property in the same district,

b) whether the need for the variance results from a self-imposed hardship, and

c) whether the variance applied for is the minimum variance that will permit the reasonable use of the land.

14. On June 2, 1988, the Board of Adjustment denied plaintiff's request for a variance [**12] because the need for the variance was caused by plaintiff's own actions. Plaintiff opened and began operation of Thee Dollhouse III in violation of the existing zoning provisions.

15. On June 21, 1988, plaintiff filed this action for declaratory judgment, permanent injunction and attorney's fees.

16. The only evidence presented by plaintiff was through James Williams concerning the circulation and submission of the petition and the purchase and sale of a duplex.

17. Plaintiff introduced no evidence regarding Broward County's treatment of the plaintiff with respect to the 1,000 foot church distance provision, although the plaintiff has stipulated that the business is within 1,000 feet of a church.

18. The plaintiff did proffer evidence regarding the value of residential property in the same subdivision as the church, although it was acknowledged that none of these residential properties is within 500 feet of the adult nightclub.

[*1574] CONCLUSIONS OF LAW

1. In Dollhouse I, this Court previously held that Sections 39-225 through 39-229 of the Broward County Code of Ordinances (the "distance ordinances") are facially valid time, place and manner regulations Id. at 18. The sole issue [**13] before the Court in this case is Broward County's treatment of plaintiff with respect to the distance ordinances.

2. Plaintiff did not introduce any evidence to establish that Broward County unconstitutionally applied the church distance provision to plaintiff, or that the application of the provision has an unconstitutional effect. Rather, the plaintiff stipulated that it was within 1,000 feet of a church. The testimony of Shirley Maurer established that plaintiff applied for a variance of the church distance provision, and that the application was denied. No evidence was presented to establish that Broward County acted arbitrarily, capriciously, or in any way unconstitutionally to enforce the church distance provision.

3. The evidence introduced in Dollhouse I, by Leigh Kerr and the study he prepared, established that there are 26 potential sites in unincorporated Broward County in which adult businesses may operate without violating the distance provisions. Therefore, the evidence does not establish that the church distance provision has an unconstitutional effect on plaintiff. Renton v. Playtime Theatres, Inc., 475 U.S. 41 at 53, 54, 89 L. Ed. 2d 29, 106 S. Ct. 925.

4. The only evidence introduced by the [**14] plaintiff regarding the application of the residential distance requirement was that of James Williams regarding the petition submitted to obtain a waiver of the requirement, the petition itself, and letters pertaining to the petition. Mr. Williams' testimony established that two residences were within 500 feet of Thee Dollhouse III, and that plaintiff attempted to comply with the petition requirements by having one of its principals and another entity buy one of the two residences and obtain the signatures of plaintiff's own employees as residents. Plaintiff did not attempt to obtain signatures of any businesses within 500 feet of its location, and did not obtain signatures from the other residential property.

5. Shirley Maurer testified that the waiver provision has consistently been interpreted to require signatures of 51% of a universe of people which includes all of those listed in the ordinance, that it was so applied to plaintiff, and that other businesses have obtained waivers. Ms. Maurer also testified that property owners, residents and business operators all have an interest in the location of adult uses near them, and that those interests are different. This Court concludes [**15] that the waiver provision as interpreted by the Building and Zoning Enforcement

Division has not been arbitrarily or capriciously applied to this plaintiff.

6. Live entertainment, as well as political and ideological speech is protected by the First Amendment. Erznoznik v. City of Jacksonville, 422 U.S. 205, 45 L. Ed. 2d. 125, 95 S. Ct. 2268 (1975); Schact v. United States, 398 U.S. 58, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970). "Nudity alone" does not place otherwise protected material outside the protection of the First Amendment, although obscenity is not protected by the First Amendment. Cf. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975); Jenkins v. Georgia, 418 U.S. 153, 41 L. Ed. 2d 642, 94 S. Ct. 2750 (1974) with Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957).

7. The Eleventh Circuit Court of Appeals recently addressed the Constitutionality of an ordinance that limited nude dancing. International Food & Beverage Systems v. Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986). The court there stated: "[we] may take it for granted that nude dancing is Constitutionally protected expression, at least if performed indoors before pay customers and not . . . before casual viewers." Id. at 1525. See also Krueger v. Pensacola, 759 F.2d 851, 854 (11th [**16] Cir. 1985).

[*1575] 8. Although the power of local governments to zone and control land use is unquestionably broad and within their fundamental police powers, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest. United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968); Schneider v. State, 308 U.S. 147, 84 L. Ed. 155, 60 S. Ct. 146

(1939). In determining the appropriate level of scrutiny to be applied to a challenged ordinance, a critical inquiry is whether the ordinance is aimed at suppressing protected expression or whether its primary goal is a matter within the legitimate police powers of the governmental entity which has a secondary or incidental impact on protected speech. Compare Stromberg v. California, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931) (striking down a law that prohibited expression by displaying any flag, badge or banner as content-based as opposed to content-neutral); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535-36, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980) with Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (upholding ordinance that prohibited the posting of signs on public property as content-neutral).

9. The [**17] Supreme Court has consistently held that the First Amendment forbids the government to regulate speech in order to exclude the expression of certain points of view from the marketplace of ideas. See Bolger v. Youngs Drug Products, 463 U.S. 60, 65, 72, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535-36, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980); Carey v. Brown, 447 U.S. 455, 462-63, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980). The total suppression of protected ideas subjects the law to strict scrutiny and places the burden on the governmental entity to show a compelling state interest in support of its law. See Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983); Widmar v. Vincent, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S.Ct. 269 (1981).

10. In contrast, a viewpoint-neutral regulation may

be analyzed within the framework established by the Supreme Court in United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968):

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment [**18] freedoms is no greater than is essential to the furtherance of that interest. (underscoring supplied) Id. at 377. As the Court's language indicates, a content-neutral regulation will be subjected to a somewhat heightened, though not strict, standard of scrutiny. In this situation, the ordinance will be analyzed as a time, place or manner regulation. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L.Ed.2d 221, 104 S. Ct. 3065 (1984). n3

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - -

n3 The Supreme Court has stated that the four-factor standard of O'Brien is essentially the same standard applied to time, place or manner restrictions. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 n. 8, 82 L.Ed.2d 221, 104 S. Ct. 3065 (White, J. for the majority), 308 n. 6 (Marshall J. on behalf of himself and Brennan, J., dissenting (1984).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - -

11. The Supreme Court has held, in the context of a distance ordinance, that a municipality can differentiate between adult theaters and other theaters in attempting to

combat the "secondary effects" of such theaters, i.e., preserving the character of the neighborhood. The Court reasoned:

[We] have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, [**19] either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that [*1576] the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances. Young v. American Mini Theatres, Inc., 427 U.S. 50, 62, 49 L. Ed. 2d 310, 96 S.Ct. 2440 (1976). The Court concluded that the distance ordinances at issue were content-neutral and, therefore, analyzed the state's interest within the time, place and manner framework in upholding the ordinances.

12. Analyzing the subject distance ordinances as time, place and manner regulations, utilizing the O'Brien factors, the Court has little difficulty in concluding that the distance ordinances are facially valid. First, it is clear that the governmental interest meant to be furthered here, as it was in Young and Renton, is within the police powers of the government and is sufficiently substantial or important. The County stated that the purpose of the distance ordinances is to avoid the secondary effects that adult entertainment establishments have on neighboring property values, which [**20] if left unchecked, may cause blight.

13. There is, additionally, record support that confirms the County's primary motivation for adopting the distance ordinances. First, the preamble to Ordinance No.

78-33 itself states that the ordinance is being passed because "it has been demonstrated that the establishment of certain businesses in business districts has a deleterious effect on both the business and residential segments of the neighborhood, causing blight and downgrading of the property values." Second, the County's Senior Planner confirmed that these are the reasons the County adopted the distance ordinances.

14. Although there was no evidence that the County actually conducted a study to confirm that adult entertainment establishments cause blight and a downgrading of the property values, Renton established that the County may properly rely on studies conducted in other cities and/or the actual experiences of other cities in determining how best to accomplish its goals. 106 S.Ct. at 931. The County Attorney indicated in this case that the subject ordinances were patterned after those enacted in Detroit and upheld by the Supreme Court in Renton. In justifying the distance [**21] ordinances, it is enough that the County relied on Detroit's experiences.

15. Continuing with the O'Brien analysis, the Court concludes that the distance ordinances are narrowly tailored. The distance ordinances, by themselves, do not have the effect of excluding all adult entertainment establishments within unincorporated Broward County. As the County demonstrated, there are at least 26 sites within the County where adult entertainment establishments could operate without violating the distance requirements. Based thereon, this Court concludes that a reasonable number of locations exist where adult entertainment can be presented unaffected by the distance ordinances as is constitutionally mandated. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986);

International Food & Beverages Systems v. Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986).

16. The Doctrine of res judicata provides that when a final judgment has been entered on the merits it is a finality as to the claim in demand or controversy, not only as to every matter which was offered to sustain or defeat the claim, but also as to any other admissible matter which could have been offered for that purpose. [**22] Nevada v. United States, et al., 463 U.S. 110, 77 L.Ed. 2d 509, 103 S. Ct. 2906 (1983); McWilliams v. McWilliams, 804 F.2d 1400 (5th Cir. 1986); Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499 (11th Cir. 1984). The issues raised by plaintiff's pleadings and responses to discovery either were addressed in Dollhouse I, or should have been raised therein.

17. Plaintiff has claimed that the "waiver" provision of Section 39-225(b) of the Broward County Code of Ordinances constitutes an unconstitutional prior restraint on plaintiff's First Amendment rights. A prior restraint claim arises when governmental personnel are vested with [*1577] discretion to either permit or deny the exercise of a protected right, without procedural safeguards. Southeastern Promotions, Ltd. v. Conrad, et al., 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975).

18. The waiver provision is not an unlawful prior restraint as applied to plaintiff because plaintiff has never been prevented or restrained from presenting its adult entertainment by application of the ordinance, and plaintiff may not assert that the waiver provision is a facially invalid prior restraint in light of this Court's holdings in Dollhouse I.

19. Plaintiff claims that the language of [**23]

the provision is vague and that such vagueness allows the Zoning Division too much discretion, creating the opportunity for unlawful prior restraint.

20. The court in Young v. American Mini Theatres, 427 U.S. 50, 49 L.Ed.2d 310, 96 S. Ct. 2440 (1976), held that the respondents could not raise the issue of vagueness of an ordinance that clearly applied to them. Id. at 59. In this case, the residential distance restriction clearly applies to prohibit plaintiff from operating an adult business at the site of Thee Dollhouse III. Further, the petition submitted by plaintiff clearly did not comply with the requirements of the waiver provision. Section 39-225(b) requires that a petition contain the signatures of 51% of those people owning real property, residing or operating or managing a business within 500 feet of the adult use. Plaintiff's petition contained no signatures of operators and managers of businesses. Evidence shows that many businesses are located within 500 feet of Thee Dollhouse III. Therefore, plaintiff clearly did not satisfy the requirements of the waiver provision.

21. The distance ordinances, including the waiver provisions, were held by this Court to be a facially valid time, place and manner [**24] restriction. Plaintiff claims that the provision is so vague that the Division may act to prevent anyone from coming within its provisions. This allegation is an attack on the facial validity of the provision and, therefore, is not before the Court; it was decided in Dollhouse I. This Court has re-reviewed its previous holding as to the facial validity of the distance ordinances, particularly considering all the additional testimony, arguments and positions taken by the parties in this Dollhouse II case, and hereby concludes that the original ruling herein remains valid and this Court hereby

REAFFIRMS and READOPTS its position in the scope of and including all of the proceedings in Dollhouse I and Dollhouse II.

22. The waiver provision of the distance ordinance does not constitute an invalid prior restraint on plaintiff's exercise of its constitutional free speech rights because the ordinance includes sufficient safeguards to prevent the Division from arbitrarily withholding a waiver. The waiver section provides:

> The prohibition shall be waived upon the presentment to the building and zoning enforcement division of a written petition requesting such waiver, signed by 51 percent [**25] of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed location of the designated use.

The cited section clearly establishes the criteria for obtaining a waiver by petition and does not leave discretion in the Division. It provides that a waiver shall be granted upon submission of a petition containing a specific percentage of certain signatures. These criteria insure the fair application of the provision to all applicants and do not provide opportunity for the Division staff to discriminate between differed speakers or messages.

23. Plaintiff further claims that the provision of Section 39-225(b) which requires the Division to "carefully" investigate the petition vests the Division with discretion to reject a petition for unspecified reasons or to indefinitely delay approval. The provision states:

> Building and zoning enforcement division shall

carefully investigate the petition and signatures on the petition to verify that the petitioners do in fact own real property, or reside or do business in a residentially zoned district within 500 feet of the proposed designated use. [*1578] Section 39-225(b), Broward County Code [**26] of Ordinances.

The provision when read in its entirety includes criteria to limit the Divisions's investigation to the single factual issue of verifying ownership. Therefore, the waiver provision contains sufficient objective criteria to prevent the Division from restricting plaintiff's operation in a discretionary manner. Also, plaintiff's petition for waiver was reviewed and rejected in a timely manner within approximately one week of its submission. Plaintiff clearly did not suffer from any alleged indefinite delay and, therefore, has no valid "as applied" challenge.

24. In holding these distance ordinances valid, including the church and school provisions, this Court impliedly found that the term "church," although not specifically defined in the Broward County Code of Ordinances, has a clear enough common meaning to provide adequate notice to those persons who may be subject to the provisions of the distance ordinances. To the extent that any doubt may exist as to the meaning of "church," the court in Young held that minimal vagueness which is readily subject to a narrowing construction by the courts is not fatal. Young v. American Mini Theatres, 427 U.S. 50 at 61, 49 L.Ed.2d 310, 96 S. Ct. 2440.

25. [**27] Courts have consistently held that zoning and other regulations applicable to churches also apply to Jehovah's Witness Kingdom Halls. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of

Lakewood, Ohio, 699 F.2d 303 (6th Cir. 1983); Minney v. City of Azusa, 164 Cal. App. 2d 12, 330 P.2d 255 (Cal. Dist. Ct. App. 1958). Both cases concerned the application of a comprehensive zoning code to a Kingdom Hall. In each case the Jehovah's Witness Kingdom Hall was treated as a church and subjected to the requirements of zoning ordinances regulating placement of churches.

26. Plaintiff has admitted in the Joint Pretrial Stipulation that Thee Dollhouse III is located within 1,000 feet of a church, therefore the ordinance clearly applies to plaintiff. As stated in Young, a litigant may not successfully claim that a regulation is vague as applied to it if its operations clearly fall within the provisions of the regulation. Young v. American Mini Theatres, 427 U.S. 50 at 59, 49 L. Ed. 2d 310, 96 S. Ct. 2440. This principle precludes plaintiff's vagueness claim.

27. Plaintiff claims that the distance ordinances are overbroad in that they prevent the location of a single adult nightclub within the specified distances of residences, [**28] churches and schools. The test of the distance ordinances do clearly regulate the location of a single designated use as well as prohibit the clustering of such uses. This Court in Dollhouse I held that the distance ordinances, which include the restrictions on the location of one club, are supported by a sufficiently substantial governmental interest and are narrowly tailored. Memorandum Opinion at 18-20. Plaintiff's overbreadth claim is based entirely on the facial validity of the legislative determination to adopt the ordinance; it is not an as applied challenge. Therefore, plaintiff's overbreadth claim is barred by this Court's previous holdings regarding the distance ordinances.

28. The distance ordinances do not prevent plaintiff from presenting nude dancing as entertainment; they require that it not present such entertainment at the present location of Thee Dollhouse III. Plaintiff is free to exercise its free speech rights at any of the other locations which are permitted by the ordinances. Therefore, considering the judgment in Dollhouse I, and the adequate alternative sites available to plaintiff, it is clear that the distance ordinances do not substantially restrict [**29] plaintiff's freedom of expression.

Accordingly this Court finds as a matter of law that the distance ordinances challenged herein (both) are facially and as applied to plaintiff Constitutional and thereupon, the relief sought by the plaintiff should be and is hereby DENIED. A Final Judgment will be entered in accordance [*1579] with law under even date herewith. n4

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - -

n4 This court has also received and reviewed a Brief of Amicus Curiae submitted by and in behalf of:

Saint Nicholas Episcopal Church
First Presbyterian Church
New Covenant Church
Trinity United Methodist Church
St. Paul The Apostle Catholic Church
St. Elizabeth Church
Hope Lutheran Church and School and
The North Broward School.

There are seven churches and two schools located in the vicinity of the plaintiff's adult nightclub which is operated at 3561 North Federal Highway in the

unincorporated area of Broward County, Florida.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - -

DONE and ORDERED in Chambers at Miami, Southern District of Florida this 15 day of DECEMBER, 1989. [**30]

FINAL JUDGMENT - December 15, 1989, Filed

Pursuant to and in accordance with the Memorandum Opinion containing Findings of Fact and Conclusions of Law included herein under even date herewith, it is thereupon

ORDERED and ADJUDGED that Final Judgment be entered herein as follows:

1. Broward County Ordinances 39-225 through 39-229 contained in the Broward County Code of Ordinances be and they hereby are held and adjudged to be facially valid time, place and manner regulations, and are not unconstitutionally applied to this plaintiff.

2. Based upon the aforegoing, the complaint herein is DISMISSED WITH PREJUDICE and judgment is hereby entered in this action in favor of defendant and against the plaintiff.

3. Defendant shall recover its costs by and from plaintiff upon the filing of a bill of costs to be taxed by the Clerk of Court.

DONE and ORDERED in Chambers at Miami, Southern District of Florida this 15 day of DECEMBER, 1989.

Respectfully submitted,

LUKE CHARLES LIROT
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Clearwater, Florida 34624
(813) 874-2030
(813) 446-6784

Counsel for Petitioner

DATED: January 14, 1992

91-1168

(3)

No. _____

Supreme Court, U.S.
FILED
JAN 14 1992
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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INTERNATIONAL EATERIES OF AMERICA, INC.

Petitioner,

v.

BROWARD COUNTY, FLORIDA

Respondent.

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

VOLUME II OF II

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Appendix E Broward County Zoning Code, Article XIII, Regulation of Certain Designated Uses.

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APPENDIX C

INTERNATIONAL EATERIES OF AMERICA, INC., a Florida corporation, d/b/a "Thee Doll House III",

Plaintiff,

v.

BROWARD COUNTY, a political subdivision of the States of Florida,

Defendant.

Case No. 86-6348-Civ

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

726 F. Supp. 1556; 1987 U.S. Dist. LEXIS 15007

October 13, 1987, Decided
October 13, 1987, Filed

COUNSEL: [**1]

Richard L. Wilson, Esq., Dallas, Texas and Bruce L. Randall, Esq., Ft. Lauderdale, Florida, Attorneys for Plaintiff.

Alexander Cocalis, Esq., Office of the County Attorney, Ft. Lauderdale, Florida and Richard Doody, Esq., Assistant General Counsel, Attorneys for Defendant.

JUDGES: Sydney M. Aronovitz, United States District Judge.

OPINIONBY: ARONOVITZ

OPINION: [*1558] MEMORANDUM OPINION CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW

SYDNEY M. ARONOVITZ, UNITED STATES DISTRICT JUDGE

THIS CAUSE was tried non-jury before the Court at which time testimony and evidence were adduced by both parties. Likewise, this Court has, upon plaintiff's motion, viewed the location and the surrounding area of the subject property involved in this litigation, in the company of counsel for both sides.

The Court has considered the evidence, oral argument, memoranda of law, the viewing of the location, and being otherwise fully advised in the premises, makes and enters herewith its Findings of Fact and Conclusions of Law.

NATURE OF THE ACTION

The nature of this action is a complaint for permanent injunction, declaratory judgment and attorney's fees, brought pursuant to 42 U.S.C. § 1983 and 1988. Essentially, plaintiff attacks ordinances affecting the unincorporated areas of Broward [**2] County, Florida, prohibiting placement of an adult nightclub in any area zoned other than B-2B and within 1,000 feet of a church, kindergarten, or school, or within 500 feet of a residentially zoned district.

BASIS OF FEDERAL JURISDICTION

Jurisdiction is based upon 28 U.S.C. @@ 1331 and 1343.

FINDINGS OF FACT

1. Plaintiff, International Eateries of America, Inc., a Florida corporation, operates a restaurant and nightclub at 3561 North Federal Highway in unincorporated Broward County, Florida, known as "Thee Dollhouse III." Thee Dollhouse III presents non-obscene, nude dancing as the primary form of entertainment for its customers.

2. Defendant Broward County has a population in excess of one million persons, and occupies more than 410 square miles on Florida's southeast coast, with the city of Fort Lauderdale being the County seat. Within the unincorporated area of Broward County, which is involved in this litigation, there are approximately 150 square miles.

3. On September 16, 1977, the Board of Commissioners of Broward County adopted Ordinance No. 77-78, which together with Ordinance No. 78-33 adopted on June 27, 1978, prohibits the locating of an adult nightclub within [**3] 1,000 feet of a church, kindergarten, nursery, elementary, middle or high school, or day care center. Additionally, Ordinance No. 78-33 prohibits placement of an adult nightclub within 500 feet of a residentially zoned district. Ordinance No. 77-48 and Ordinance No. 78-33 are incorporated into the Broward County Code of Ordinances at Chapter 39, Article XIII, Section 39-225 through 39-229. These Ordinances are collectively referred to within this Opinion as the "distance ordinances."

4. On March 15, 1985, the Board of County Commissioners adopted Ordinance Nos. 85-17, 85-18, and 85-19 which are [*1559] incorporated into the Broward County Code of Ordinances at Chapter 39, Article VLIII, Section 39-976 entitled "Uses Permitted," at Chapter 39, Article XIII, Section 39-226 entitled "Designated Uses," and at Chapter 39, Article VIII, Section 39-128 entitled "Terms Defined."

5. The aggregate effect of Ordinance Nos. 85-17, 85-18 and 85-19 is to limit certain designated uses, including adult nightclubs, to a Special Business B-2B Zoning District. "Adult nightclub" is defined within Ordinance No. 85-17 as follows:

Adult Nightclub: For the purpose of this ordinance, the term 'adult nightclub' [**4] shall mean and include any place of business or establishment or cabaret which features live entertainment distinguished or characterized by an emphasis on matter depicting, exposing, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' for observation by patrons therein.

Specified Anatomical Areas: For the purposes of this ordinance, the term 'specified anatomical areas' shall mean and include:

(1) Less than completely and opaguely [sic] covered:

a. Human genitals, pubic region;

b. Buttock or full anal cleft or cleavage;

c. Female breast below a point immediately above the top of the areola; and

(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Ordinance No. 85-17, amending definitional section of Chapter 39, Article VIII, Section 39-128 of the Broward County Code of Ordinances. These Ordinances are collectively referred to within this Opinion as the "designated uses ordinances."

6. Each of the respective designated uses ordinances contains a severability clause, which provides:

If any section, sentence, clause or phrase of this Ordinance is held to be invalid or unconstitutional by any [**5] court of competent jurisdiction, then said holding shall in now way affect the validity of the remaining portions of this Ordinanee.

7. Prior to the enactment of the designated uses ordinances, adult nightclubs were not restricted to a particular zoning district, although they were subject to the above-mentioned distance ordinances.

8. According to Al Schmou, the County's Senior Planner, there were approximately eight adult nightclubs operating in Broward County at the time of trial, four of which as a result of the annexation of a large commercial area of Pompano Beach.

9. Shirley Maurer, the County's Land Use Supervisor, testified that two or three of the four adult nightclubs in existence at the time that the designated uses ordinances were enacted were granted a change of a non-conforming business certificate of occupancy.

10. At the time this lawsuit was filed, through the present time, there has been only one plot of land in unincorporated Broward County zoned B-2B, measuring approximately 125' by 250' (3/4 of an acre) on Griffin Road near the Fort Lauderdale airport. In other words, there is only a single site in all of the unincorporated area of Broward County which is zoned [**6] B-2B. No other area qualifies for the zoning use of adult nightclubs at this time, and the procedures adopted by the Broward County Commission require that for any location to be used for that purpose, there must first be a petition for rezoning to B-2B.

11. The Defendant had conducted a site availability study, the results of which were submitted to the Court both by oral testimony and written documentation. The stated purpose of the study was "to determine sites eligibile for B-2B Special Business District Zoning within Unincorporated Broward County." The criteria used by the County in conducting this study was to review all zoning maps within unincorporated Broward County, including commercial and industrial land use categories and determine where B-2B Zoning Districts could theoretically be permitted. When locating eligible sites, the County further applied the distance requirements both [*1560] as to any "eligible" unincorporated area and as to any unincorporated area that was near a municipality.

12. Based on this criteria, the County concluded that 26 sites, consisting of approximately 2,434 acres of property within unincorporated Broward County were "eligible" for a B-2B zoning [**7] classification. None of the 26 proposed sites are, however, currently zoned B-2B and the County freely admitted that as to each of the 26 proposed sites, a prospective adult nightclub owner

would be required to first obtain a zoning change to B-2B within the discretion of the Broward County Commission before opening shop.

13. On May 21, 1985, the President of International Eateries, Inc. filed with the Broward County Building and Zoning Enforcement Division an application for Certificate of Occupancy to make certain modifications to the interior of the building. On June 18, 1985, the Secretary-Treasurer of International Eateries, Inc. filed an affidavit with the Broward County Building and Zoning Enforcement Division stating that proposed improvements to the plaintiff's building would not be used as part of an adult nightclub business. On August 12, 1985, Broward County issued a Certificate of Occupancy to the plaintiff to operate a restaurant with alcoholic beverages at 3561 North Federal Highway in the unincorporated area of Broward County. On the face of the Certificate of Occupancy, it expressly stated that the certificate was conditioned upon the understanding that no nude or [**8] semi-nude entertainment activities would be permitted at the location.

14. On April 1, 1986, the defendant served the plaintiff with a Notice of Violation for operating an adult nightclub in violation of Chapter 39, Article XIII, Sections 39-225 through 39-226, Broward County Code of Ordinances. The cited provisions of the Broward County Code of Ordinances prohibit the operation of an adult nightclub within 500 feet of a residential district or within 1,000 feet of a church. In the same Notice of Violation, the defendant cited the plaintiff for operating a business without a proper zoning certificate in violation of Chapter 39, Article II, Section 39-10, Broward County Code of Ordinances.

15. On April 10, 1986, the defendant served an additional Notice of Violation on the plaintiff for operation of an adult nightclub in a B-3 General Business Zoning District in violation of Chapter 39, Article LVIII, Section 39-976, Broward County Code of Ordinances, which section provides that an adult nightclub is a permitted use only in the Special Business B-2B Zoning District.

16. The existing zoning on the plaintiff's property is General Business B-3 Zoning District. The existing land use designation [**9] for the subject property is commercial. The plaintiff's restaurant and nightclub is located on parcel "A" of Cresthaven No. 9 Replat. The prior use of the plaintiff's property, prior to October of 1984, was as "Starship Odyssey," a video arcade.

17. On May 1, 1986, plaintiff filed the instant action seeking preliminary and permanent injunctive and declaratory relief and on May 9, 1986, a hearing was held on plaintiff's Emergency Motion for Preliminary Injunction. Based upon testimony given at that hearing, this Court issued an Order on May 16, 1986, staying all further proceedings in this action to allow the plaintiff to pursue its administrative remedies with defendant Broward County by applying for a rezoning of the subject property to the Special Business B-2B Zoning District and applying to the Broward County Board of Adjustment for a variance from the distance requirements outlined in the Broward County Zoning Code.

18. On November 25, 1986, the plaintiff, International Eateries of America, Inc., filed a petition with the Broward County Office of Planning to rezone the following described property from General Business B-3 District to Special Business B-2B District:

A portion [**10] of PARCEL "A," CRESTHAVEN NO. 9 RE-PLAT, according to the Plat thereof, as recorded in Plat Book 46, Page 1, of the Public Records of Broward County, [*1561] Florida. Said lands situate, lying and being in Broward County, Florida containing 23, 328 square feet or 0.536 acres more or less, subject to all easements, reservations and rights-of-way record.

The above-described property is the site of the plaintiff International Eateries of America, Inc.'s adult nightclub d/b/a Thee Doll House III, 3651 North Federal Highway, Broward County, Florida.

19. On February 4, 1987, the Broward County Zoning Board considered the plaintiff's petition to rezone the above-described property from General Business B-3 District to Special Business B-2B District. After a lengthy public hearing involving testimony from a number of interested parties including representatives of the plaintiff, the Broward County Office of Planning, the Broward County Building and Zoning Enforcement Division and members of the public, the Broward County Zoning Board voted to recommend to the Broward County Board of County Commissioners that plaintiff's petition for rezoning be denied.

20. On March 24, 1987, the Broward County [**11] Board of County Commissioners held a public hearing to consider the plaintiff International Eateries of America, Inc.'s petition to rezone the above-described property from General Business B-3 District to Special Business B-2B District. Testimony presented to the Broward County Board of County Commissioners at the public hearing included the recommendation of the Broward County Zoning Board, and

statements from representatives of the plaintiff, the Broward County Office of Planning, city officials from the City of Lighthouse Point, and a number of private citizens. At the conclusion of the public hearing, the Broward County Commissioners voted to deny the plaintiff's petition for rezoning to Special Business B-2B District.

21. The petition to the Zoning Board of Adjustments for variances as to distance requirements has never been acted upon, evidently on the premise that since the B-2B Zoning had been denied, there was no need to proceed administratively on the variances.

22. Thee Dollhouse III presents non-obscene, nude dancing as the primary form of entertainment for its patrons (the parties have so stipulated at paragraph 5a of the Joint Pretrial Stipulation), previously incorporated [**12] herein as Finding of Fact paragraph number 1. The County never submitted evidence to the Court as to the nature or type of nude entertainment, nor whether it was lewd or lascivious, nor any description of the nature or type of dancing. The parties have agreed that under the ordinances in effect, the entertainment at Thee Dollhouse III is "non-obscene, nude dancing." Therefore, no finding of fact is made herein with regard to the exact nature or type of nude dancing.

23. Additionally, neither party has chosen to introduce any factual matter or issue of law relating to the applicability or non-applicability of the dispensing of alcoholic beverages and what effect, if any, under the Twenty-First Amendment this might or could have upon the rights of the County to exercise some zoning restraint under its police power. Therefore, again, there is no finding of fact made herein or conclusion of law premised upon the

aforegoing, since the parties both seemingly do not consider it relevant and have not presented it to the Court as a matter to be determined. n1

n1 Cf. International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986) (remanding to district court to consider, among other things, the Twenty-First Amendment issue, where the ordinance in question specifically related to establishments that both served alcoholic beverages and provided nude entertainment). [**13]

24. Although no special zoning studies seem to have been made as a predicate for the adoption of the ordinances, testimony and evidence was adduced that they are modeled after the City of Detroit ordinances.

DISCUSSION

I. Analytical Framework

Live entertainment, as well as political and ideological speech is protected by the First Amendment. Erznoznik v. City of Jacksonville, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 [*1562] (1975); Schact v. United States, 398 U.S. 58, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970). "Nudity alone" does not place otherwise protected material outside the protection of the First Amendment, although obscenity is not protected by the First Amendment. Cf. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975); Jenkins v. Georgia, 418 U.S. 153, 41 L. Ed. 2d 642, 94 S. Ct. 2750 (1974) with Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957).

The Eleventh Circuit Court of Appeals recently addressed the constitutionality of an ordinance that limited nude dancing. International Food & Beverage Systems v. Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986). The court there stated: "[w]e may take it for granted that nude dancing is constitutionally protected expression, at least if performed indoors before pay customers and not . . . before casual [**14] viewers." Id. at 1525. See also Krueger v. Pensacola, 759 F.2d 851, 854 (11th Cir. 1985).

Although the power of local governments to zone and control land use is unquestionably broad and within their fundamental police powers, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest. United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968); Schneider v. State, 308 U.S. 147, 84 L. Ed. 155, 60 S. Ct. 146 (1939). In determining the appropriate level of scrutiny to be applied to a challenged ordinance, a critical inquiry is whether the ordinance is aimed at suppressing protected expression or whether its primary goal is a matter within the legitimate police powers of the governmental entity which has a secondary or incidental impact on protected speech. Compare Stromberg v. California, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931) (striking down a law that prohibited expression by displaying any flag, badge or banner as content-based as opposed to content-neutral); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535-36, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980); Carey v. Brown, 447 U.S. 455, 462-63, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980) with Members of City Council v. Taxpayers for Vincent, [**15] 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (upholding ordinance that prohibited the posting of signs on

public property as content-neutral).

The Supreme Court has consistently held that the First Amendment forbids the government to regulate speech in order to exclude the expression of certain points of view from the marketplace of ideas. See Bolger v. Youngs Drug Products, 463 U.S. 60, 65, 72, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535-36, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980); Carey v. Brown, 447 U.S. 455, 462-63, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980). The total suppression of protected ideas subjects the law to strict scrutiny and places the burden on the governmental entity to show a compelling state interest in support of its law. See Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983); United States v. Grace, 461 U.S. 171, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983); Widmar v. Vincent, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 c(1981).

In contrast, a viewpoint-neutral regulation may be analyzed within the framework established by the Supreme Court in United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968);

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial [**16] governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. at 377. As the Court's language indicates, a content-neutral regulation will be subjected to a somewhat heightened, though not strict, standard of scrutiny. In this

situation, the [*1563] ordinance will be analyzed as a time, place or manner regulation. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984). n2

n2 The Supreme Court has stated that the four-factor standard of O'Brien is essentially the same standard applied to time, place or manner restrictions. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 n.8, 82 L. Ed. 2d 221, 104 S. Ct. 3065 c(White, J. for the majority), 308 n.6 (Marshall, J. on behalf of himself and Brennan, J., dissenting) (1984).

The Supreme Court has held, in the context of a distance ordinance, that a municipality can differentiate between adult theaters and other theaters in attempting to combat the "secondary effects" of such theaters, i.e., preserving the character of the neighborhood. The Court reasoned: [**17] [W]e have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances. Young v. American Mini Theatres, Inc., 427 U.S. 50, 62, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). The Court concluded that the distance ordinances at issue were content-neutral and, therefore, analyzed the state's interest within the time, Place and manner framework in upholding the ordinances.

II. Plaintiff's Constitutional Attacks

Plaintiff challenges the County's designated uses ordinances and distance ordinances both facially and as applied to the facts of this case. Plaintiff claims that the County's zoning scheme is nothing less than outright censorship of protected speech in violation of the First and Fourteenth Amendments and, further, that the Zoning Code as applied to plaintiff is vague, overbroad, an unconstitutional prior restraint [**18] and a substantial restriction on freedom of expression.

a. The Distance Ordinances

Initially, it should be noted that plaintiff's constitutional challenge to the County's distance ordinances as applied is premature in that, through no fault of the plaintiff, plaintiff's request for a variance from the distance requirements has not yet been ruled upon. As previously stated, the Broward County Board of Adjustment would not rule on plaintiff's variance request unless and until plaintiff was granted a B-2B re-zoning of the subject property. The issue of the County's treatment of plaintiff with respect to the distance ordinances is not, therefore, before this Court at this time.

With regard to plaintiff's facial attack of the County's distance ordinances, the Court has no quarrel with the County's right to enact such an ordinance, even though such ordinances treat certain businesses which are protected by the First Amendment differently than others.

The Supreme Court, in two cases, has made clear that "location ordinances" are content-neutral and are, therefore, to be analyzed as time, place and manner regulations. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986);

[**19] Young v. American Mini Theatres, Inc., 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). In Young, the Court stated:

> Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content.

Id. at 78-79.

Analyzing the subject distance ordinances as time, place and manner regulations, utilizing the O'Brien factors, the Court has little difficulty in concluding that the distance ordinances are facially valid. First, it is clear that the governmental interest meant to be furthered here, as it was in Young and Renton, is within the police powers of the government and is sufficiently [*1564] substantial or important. The County stated that the purpose of the distance ordinances is to avoid the secondary effects that adult entertainment establishments have on neighboring property values, which if left unchecked, may cause blight.

There is, additionally, record support that confirms the County's primary motivation for adopting the distance ordinances. First, the preamble to Ordinance No. 78-33 itself [**20] states that the ordinance is being passed because "it has been demonstrated that the establishment of certain businesses in business districts has a deleterious effect on both the business and residential segments of the neighborhood, causing blight and downgrading of the property values." Second, the County's Senior Planner confirmed that these are the reasons the County adopted the distance ordinances.

Although there was no evidence that the County actually conducted a study to confirm that adult entertainment establishments cause blight and a downgrading of property values, Renton established that the County may properly rely on studies conducted in other cities and/or the actual experiences of other cities in determining how best to accomplish its goals. 106 S. Ct. at 931. The County Attorney indicated in this case that the subject ordinances were patterned after those enacted in Detroit and upheld by the Supreme Court in Renton. In justifying the distance ordinances, it is enough that the County relied on Detroit's experiences.

Continuing with the O'Brien analysis, the Court concludes that the distance ordinances are narrowly tailored. The distance ordinances, by themselves, [**21] do not have the effect of excluding all adult entertainment establishments within unincorporated Broward County. As the County demonstrated, there are at least 26 sites within the County where adult entertainment establishments could operate without violating the distance requirements. Based thereon, the Court concludes that a reasonable number of locations exist where adult entertainment can be presented unaffected by the distance ordinances as is constitutionally mandated. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986); International Food & Beverage Systems v. Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986).

b. The Special Uses Ordinances

The County's special uses ordinances are more problematic. Initially, no separate justification was

advanced by the County for the special uses ordinances different from that advanced on behalf of the distance ordinances. The County merely stated that all of the ordinances together were enacted for the purpose of avoiding blight and the devaluation of property.

There was no testimony at trial specifically directed to the purposes of the establishment of the special uses B-2B Special District Zone, although there [**22] was comment by Mr. Shmou, the County's Senior Planner, at the hearing held before the Broward County Commission with respect to plaintiff's request for rezoning that "[t]he intent of the B-2B zoning district is not to allow adult entertainment within 500 feet of residentially zoned property or within 1,000 feet of a church." Transcript of hearing held on April 28, 1987 at p. 5 (plaintiff's exhibit 5). These comments are obviously of limited help in ascertaining the County's purpose in enacting the special uses B-2B district, mixing as it does the special uses ordinances with the distance ordinances.

Without some clear justification articulated by the County as to what goal it wished to accomplish by restricting adult nightclubs to what is essentially a 3/4 acre plot of land, the Court is at a loss to infer how the restriction of all adult nightclubs within a 3/4 acre parcel of land could accomplish the goal of avoiding blight and property devaluation, particularly when the special uses ordinance is considered in conjunction with the County's zoning plan as a whole. As the Eleventh Circuit Court of Appeals admonished in International Food & Beverage Systems v. Fort Lauderdale, 794 F.2d 1520, 1527 [**23] (11th Cir. 1986):

The ordinances here challenged should have been tested by reference to the [*1565] entire zoning scheme

of which they were meant to be a part, not as an isolated whim of the commissioners, or an attempt by them to impose their notions of moral behavior on the community.

Considering the plan as a whole, it must be remembered that when the special uses ordinances were passed, the County already had in effect the distance ordinances.

The distance ordinances, as previously stated, were a valid response to the problems that have been shown to exist where there is a concentration of adult entertainment establishments. The distance ordinances have the effect of dispersing these establishments throughout the city, thereby avoiding the unwanted secondary effects. Given the fact that the County has apparently chosen to disperse adult entertainment businesses, like Detroit, it is difficult to understand how limiting adult nightclubs to such a small parcel of land fits within the County's overall plan to deal with the legitimate problems of blight and property devaluation. Without considering the distance ordinances, it is conceivable that the County has elected [**24] to concentrate adult entertainment businesses, similar to the "red light districts" in Boston, Massachusetts, and near the Times Square theater district in New York City. n3 Although the Supreme Court has approved the government's right to disperse or concentrate adult businesses to achieve a proper governmental interest, n4 the County's present zoning plan appears to both disperse and concentrate adult entertainment businesses.

n3 See Stein, Regulation of Adult Businesses Through Zoning After Renton, 18 Pac. L.J. 351 (1987).

n4 Renton v. Playtime Theatres, Inc., 475 U.S. 41,

106 S. Ct. 925, 931, 89 L. Ed. 2d 29 (1986) ("Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton.")

The Court has thoroughly examined the record herein in an attempt to discern the County's purpose in enacting the special uses ordinances. The minutes of the public hearing at which the special uses ordinances were enacted provides that:

Commissioner Beach said items 8-11 on this day's agenda all relate to bringing under control the proliferation of the type of facilities that have been spreading in the unincorporated area of Broward County [**25] due to a lack of adequate zoning laws to control such facilities. Commissioner Beach said items 8-11 will protect the residential and family shopping areas in the unincorporated area.

Minutes of Public Hearing of Board of County Commissioners held on March 15, 1985 as appearing in minute book 113 at page 41 (defendant's exhibit 7). This statement indicates that the County intended to curtail the number of adult entertainment businesses in the unincorporated area of Broward County. n5

n5 In upholding the challenged ordinances in Young, the Court noted:

The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the City of Detroit. There was no claim that the distributors or exhibitors of adult films are denied access to the market or, conversely, that

the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained. 427 U.S. at 55.

Additionally, the following statements were made by unidentified Zoning Board Commissioners at a hearing held before it on plaintiff's application for rezoning:

SPEAKER 14 [**26] . . . . [W]e have other zoning categories and we don't have any land zoned in the county for that purpose because we never had application for it and someone makes application and no matter what the reason is, the board may wish to deny that application, does the ordinance have to be found unconstitutional simply because there ain't no zoning in the county?

SPEAKER 15 The counties [sic] position [is] that there are a number of areas in the county that can conceivably be rezoned B-2B which would be any area that's consistent with commercial land use designation . .

An applicant can come into a county and apply for B-2B and, depending [*1566] upon the location, have the B-2B in any number of areas. It is just that we have put the adult uses into the B-2B and this is the very first application.

I don't agree with Mr. Wilson [plaintiff's attorney] that the county can't, that there has to be an existing number of B-2B areas. His remedy is to do what he's doing tonight and to come in tonight and request an area to be zoned B-2B and I think what keeps the county from having the ordinance successfully challenged, all those adult nightclubs that are out there now are grandfathered in

whatever [**27] zoning category they are in. They are non-conforming uses. They don't have to shut down.

Any future adult nightclubs based on Renton [sic], the county has the right to review the particular situation, decide whether or not they want to grant a particular rezoning in that location . . . . Our position, there is a number of places that you can place B-2B zoning.

Transcript of Zoning Board Meeting held on February 4, 1987, pp. 36-37 (plaintiff's exhibit 4).

Based on the totality of the evidence presented, it is concluded that in an attempt to curtail the number of adult nightclubs within the unincorporated areas of Broward County, the County enacted the special uses ordinances limiting adult nightclubs to a Special B-2B District consisting of a 3/4 acre of land under the belief that it was not unduly hampering access to the market because a procedure for rezoning on a case-by-case existed. n6

n6 See Ebel v. City of Corona, 767 F.2d 635 (9th Cir. 1985). In Ebel, the Ninth Circuit struck down an adult business ordinance after plaintiff established on the record that there was no other site at which it could relocate. Id. at 639.

However, the effect of the special uses [**28] ordinances is to severely curtail free access to the market in fact. Further, the procedure afforded for a case-by-case determination of rezoning does not provide meaningful access to the market and constitutes an unconstitutional prior restraint in that it vests almost unbridled discretion in the Commission's hands. Kunz v. New York, 340 U.S. 290, 95 L. Ed. 280, 71 S. Ct. 312 (1951). n7 Viewing the

special uses ordinances as part of the County's zoning plan as a whole, the Court finds that the County has not demonstrated a compelling state interest to justify the special uses ordinances.

n7 As the Supreme Court has stated: "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." New York Times Co. v. United States, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971).

Even granting the County every possible concession, however, the Court would still be bound to strike down the County's special uses ordinances under the lesser standard accorded legitimate time, place and manner regulations as postulated by the Court in O'Brien. Assuming for the sake of argument that the special uses ordinances are content-neutral, and accepting the County's explanation [**29] that the special uses ordinances were enacted for the purpose of avoiding blight and proper devaluation, the special uses ordinances fail under the last prong of O'Brien, namely, they do not leave ample alternative channels for communication of the information. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984).

Because of the substantial restrictions imposed by the special uses ordinances, this case does not fall within the ambit of Young and Renton, but is rather more closely analogous to a case decided after Young, but before Renton, Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981). Schad involved an ordinance that prohibited all forms of entertainment throughout a borough of New Jersey. In striking down the ordinance for lack of a sufficiently substantial governmental

interest, the Court stressed that the restrictions involved in Young "did not affect the number of adult movie theaters that could operate in the [*1567] city; it merely dispersed them." Id. 452 U. S. at 71, 101 S. Ct. at 2184.

The Court in Young and Renton took pains to emphasize that the decision in each could very well have been different but for the fact that there was minimal impact on [**30] First Amendment interests. In Young, Justice Stevens relied on the district court's findings that compliance with the challenged ordinances would only impose a slight burden on First Amendment rights, since there were "myriad locations" within the city where new adult movie theaters could be located in compliance with the ordinances. 427 U.S. at 71, n.35. Likewise, in Renton, the Court stressed that the ordinance in question left 520 acres, or more than 5% of the entire City of Renton open to locating adult theaters. 106 S. Ct. at 932. n8 In contrast, the County here has allocated approximately .03% of its land mass for adult uses.

n8 See also Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1227 (D.C. Ga. 1981) (striking down an ordinance due to a lack of reasonable alternatives for communication where there were 200 adult businesses and 81 available sites).

As the Supreme Court stated in Renton:

In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city . . . . 106 S. Ct. at 932. The Court does not necessarily interpret Renton to [**31] constitutionally require a "myriad of locations;" however, at a minimum,

Renton requires a "reasonable opportunity" to operate. The County here has provided no meaningful access to the market for adult nightclub operators. Thus, the special uses ordinances must fail as not providing ample alternative channels for communication.

Finally, the County's special uses ordinances are unconstitutional as applied to plaintiff herein. The County has presented no evidence that a single adult nightclub can cause blight or property devaluation. Per Renton, the County is entitled to rely on the experiences of other cities in enacting adult use zoning ordinances:

The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses. 106 S. Ct. at 931.

However, in this case, the County has not conducted even a perfunctory study of the impact of plaintiff's business on its surrounding neighborhood. Nor has the County presented any evidence or argument that [**32] it relied on another city's single nightclub impact study when enacting the special uses ordinances. See Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 661 (8th Cir. 1981) (holding that some empirical basis should exist to support a finding that the presence of a single adult theater within one hundred yards of a specified area will have a deleterious effect).

To the contrary, plaintiff submitted the testimony of a real estate salesperson, who conducted a study of property values for the two-year period preceding trial in the

Pompano Beach area neighboring Thee Dollhouse III's location, and a real estate broker, who evaluated property values for the four-year period preceding trial, in the Venetian Isles and Coral Key areas adjacent to Thee Dollhouse III. Both witnesses concluded that Thee Dollhouse III's presence has not affected the number of residential sales in the area, nor has it affected the rate of appreciation for residential properties.

It cannot be said, then, that the County's special uses ordinances advance a substantial governmental interest as applied to International Eateries of America, Inc.

c. Severability

A federal court exercising its power to review [**33] the constitutionality of a legislative act should proceed cautiously, and refrain from invalidating more of the statute than is necessary. Regan v. Time, Inc., 468 U.S. 641, 652, 82 L. Ed. 2d 487, 104 S. Ct. 3262 (1984). Where severance of the invalid portions of an ordinance [*1568] or statute is consistent with legislative intent, and what remains afterward is "fully operative as a law", partial, rather than total invalidation is proper. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 934, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983). While the presence of a severability clause gives rise to a presumption of severability, id. at 932, the proper inquiry remains whether the legislative branch would have passed the valid portions of a statute if it had known of the invalidity of other provisions. Brockett v. Spokane Arcades, Inc., 472 U. S. 491, 105 S. Ct. 2794, 2803 (1985). This inquiry is, of course, appropriate to land regulation as to other modes of legislation. See, e.g., Barndollar v. Sunset Realty Corp., 379 So. 2d 1278, 1280 (Fla. 1979).

The severability clause in the special use ordinances coupled with the available legislative history indicate that the Broward County Commission intended each provision to stand or [**34] fall in isolation, and did not envision the regulation of adult entertainment in Broward County as a unique whole which depended for its integrity on the sum of all of the parts. Moreover, this is not a case where "the valid and void parts of a statute are, mutually connected with and dependent upon each other as conditions, considerations, or compensation for each other. . . ." Small v. Sun Oil Co., 222 So. 2d 196, 199-200 (Fla. 1969). The ordinances are constructed in such a way that what remains after removal of the area restrictions is a logical, functional regulatory scheme. The court finds that severance of the invalid ordinance is appropriate, and that only "adult nightclub" use is declared unconstitutional as set forth herein.

Accordingly, based on the foregoing, it is

ORDERED and ADJUDGED as follows:

1. Plaintiff's constitutional challenge to Defendant's distance ordinances, Ordinance Nos. 77-48, 77-78 and 78-33, be and the same is hereby denied.

2. Plaintiff's constitutional challenge to defendant's special uses ordinances, Ordinance Nos. 85-17, 85-18 and 85-19 be and the same is hereby granted, both facially and as applied insofar as such challenge relates to the use [**35] of "adult nightclubs".

3. Applying the severability clause to the County's special uses ordinances, this ruling is strictly limited to

adult nightclubs as defined within Ordinance No. 85-17. Nothing contained within this Opinion shall be construed as affecting any other designated use specified in Ordinance Nos. 85-17, 85-18 or 85-19.

4. The County is permanently enjoined from enforcing Ordinance Nos. 85-17, 85-18 and 85-19 insofar as these Ordinances pertain to adult nightclubs.

5. Plaintiff shall submit its motion for award of attorney's fees, if it elects to do so, within FIFTEEN (15) DAYS herefrom, together with a memorandum of law supporting the request, and affidavits setting forth the basis for claiming the fees, the amount requested, and opinions of counsel. Defendant may respond thereto with memorandum of law and counter-affidavits, within FIFTEEN (15) DAYS thereafter. If the parties cannot agree on the amount of attorney's fees, or either side objects to the method of arriving at an amount of attorney's fees, the Court will hold an evidentiary hearing thereon, if requested.

6. A Final Judgment shall issue herein pursuant hereto.

DONE and ORDERED in Chambers at Miami, Southern [**36] District of Florida, this 13 day of October, 1987.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-5076

INTERNATIONAL EATERIES OF AMERICA, INC.,

Plaintiff-Appellant,

versus

BROWARD COUNTY, FLORIDA,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

---

BEFORE: KRAVICH and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

BY THE COURT:

Appellant International Eateries of America, Inc.'s petition for rehearing is denied.

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX E

§ 39-225 BROWARD COUNTY ZONING CODE

ARTICLE XII. REGULATION OF CERTAIN DESIGNATED USES*

Sec. 39-225. Distance limitations between designated uses.

(a) In the development, enforcement and amendment of this ordinance, it is recognized that there are uses and accessory uses which because of their very nature are recognized as having serious objectionable characteristics, particularly when several of them are concentrated in any given location, thereby having a deleterious effect upon the adjacent business and residential areas. Special regulation of these uses is necessary to ensure that these adverse effects will not contribute to the blighting and downgrading of the surrounding neighborhood. None of the designated uses set forth in this article, or added from the time to time this article by amendment, shall be located nearer to the same or any other designated use nor nearer to any church or public, private or parochial, kindergarten, nursery, elementary, middle, or high school, or day care center than 1,000 feet. Measurement of the 1,000 feet shall be made in accordance with subsection (c) hereof.

(b) It shall be unlawful hereafter to establish any designated use within unincorporated Broward County if the proposed location is within 500 feet of a residentially zoned

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*__Editor's note__-Ord. No.77-48 §§ 2--6, adopted Sept. 16, 1977, effective Sept. 26, 1971[sic], amended ch. 39 by adding provisions designated by the editor as art. XIII, §§ 39-225--39-229.

district. This prohibition shall be waived upon the presentment to the building and zoning enforcement division of a written petition requesting such waiver, signed by 51 percent of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed location of the designated use. The circulator of the petition requesting a waiver shall subscribe and swear to an affidavit attached to the petition that the circulator personally witnessed the signatures on the petition and that the signatures were affixed to the petition by the persons whose names appear on the petition. Said petition shall bear at the top of each page thereof a typewritten title in the substantially the following form:

§ 39-226

> "The undersigned hereby request a waiver from the Building and Zoning Enforcement Division of Broward County, Florida, that shall permit the establishment and location of a(an) (state specifically which designated use is sought to be established) within 500 feet of my real property. residence or business."

Building and zoning enforcement division shall carefully investigate the petition and signatures on the petition to verify that the petitioners do in fact own real property, or reside or do business in a residentially zoned district within 500 feet of the proposed designated use. Measurement of the 500 feet shall be made in accordance with subsection (c) hereof.

(c) For the purposes of this article, a designated use or proposed designated use shall be deemed to be within 1,000 or 500 feet of another designated use or church, school, real property, residence, business or residentially zoned

district, respectively, as defined or described herein, if any part of the building in which, or plot of land upon which, a designated use is located or proposed to be located is within 1,000 feet or 500 feet, as the case may be, as measured by an actual or imaginary straight line upon the ground or in the air, of any part of the building in which, or plot of land upon which, another designated use or such church, school, real property, residence, business or residentially zoned district, respectively, is located. (Ord. No. 77-48, § 2,9-16-77; Ord. No. 78-33, §3,6-27-78)

Sec. 39-226. Designated uses.

The following uses are declared to be "designated uses":

(1) Adult bookstore.

(2) Adult motion picture theater.

(3) Adult mini motion theater.

(4) Adult nightclub.

(5) Massage establishment.

(6) Encounter studio. (Ord. No. 77-48, § 3, 9-16-77; Ord. No. 85-18, § 1, 3-15-85).

Respectfully submitted,

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DATED: January 14, 1992

Supreme Court, U.S.
FILED
FEB 24 1992
OFFICE OF THE CLERK

(4)

No. 91-1168

In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL EATERIES OF AMERICA, INC.,

Petitioner,

vs.

BROWARD COUNTY, FLORIDA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly applied *City of Renton v. Playtime Theaters, Inc.*, 435 U.S. 41 (1986), to uphold county zoning ordinances that set minimum separation requirements between adult-oriented business and residential areas, churches, schools and day care centers?

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No. 91-1168

In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL EATERIES OF AMERICA, INC.,

Petitioner,

vs.

BROWARD COUNTY, FLORIDA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Broward County, a political subdivision of the State of Florida, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Eleventh Circuit Court of Appeals in this case, reported at 941 F.2d 1157.

ADDITIONAL ORDINANCE PROVISIONS

BROWARD COUNTY ORDINANCES

The text of Broward County Ordinances 77-48 and 78-33, adopted on September 16, 1977, and June 27, 1978, respectively, are set out verbatim in the Respondent's Appendix. These ordinances

include the legislative findings of the Board of County Commissioners, which were omitted when the ordinances were codified as Sections 39-225 through 39-229, Broward County Code of Ordinances.

STATEMENT OF THE CASE

Petitioner's Statement of the Case improperly includes argument and facts that are not material to the questions presented, therefore Broward County here provides a complete Statement of the Case. Material printed in Petitioner's Appendix is referred to by appendix letter and page as follows: "Pet. App. A-1." Material printed in Broward County's Appendix is referred to as follows: "B.C. App. 1."

Petitioner operates an adult nightclub in unincorporated Broward County, Florida, which presents live nude dancing as the primary form of entertainment for its patrons. In 1986, Broward County issued notices of violation citing the Petitioner's business for operating within 500 feet of a residentially zoned district and within 1,000 feet of a church, in violation of Sections 39-225 through 39-229, Broward County Code of Ordinances. (Pet. App. B-5). Petitioner's nightclub, "Thee Dollhouse III," is located within 500 feet of a residentially zoned district and within 1,000 feet of the Kingdom Hall of Jehovah's Witnesses. (Pet. App. B-7).

The cited sections of the Broward County Code were adopted by the Board of County Commissioners of Broward County by Ordinance No. 77-48 on September 16, 1977, and by Ordinance No. 78-33 on June 27, 1978, and are referred to herein as the "distance ordinances." (B.C. App.)

Broward County also cited Petitioner for operating in a B-3 zoning district in violation of the "special use ordinances," which limited adult businesses to a three-fourths acre parcel zoned "B-2-B." These notices were collectively the subject of the previous case between these parties, *International Eateries of America, Inc. v. Broward County*, 726 F.Supp. 1556 (S.D. Fla. 1987), referred to hereafter as *"Dollhouse I."* (Pet. App. C). In that case, the district court held that the special use ordinances were invalid, both facially

and as applied, but held that the distance ordinances were facially valid. (Pet. App. B-11; C-16). The court reserved ruling only on Broward County's treatment of the Petitioner with respect to the distance ordinances. (Pet. App. C-15). The 1987 decision of the district court in *Dollhouse I* was not appealed.

After the final judgment was issued in *Dollhouse I* in 1987, Broward County again issued to Petitioner a notice of violation of the distance ordinances. The action which is the subject of the holding of the court of appeals below and this Petition arose from the 1987 notices of violation.

It is undisputed that Petitioner's adult nightclub is located within 500 feet of a residential area and within 1,000 feet of a Kingdom Hall of the Jehovah's Witnesses. The Petitioner opened its nightclub in violation of both the residential and church distance provisions. An officer of Petitioner corporation submitted an affidavit stating that adult entertainment would not be presented at the club. (Pet. App. C-7).

On December 15, 1987, Petitioner submitted a petition to the Broward County Building and Zoning Enforcement Division, pursuant to Section 39-225(b), Broward County Code of Ordinances, seeking a waiver of the residential distance requirement. (Pet. App. B-7). Section 39-225(b) provides:

> This prohibition shall be waived upon the presentment to the building and zoning enforcement division of a written petition requesting such a waiver, signed by 51 percent of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed location of the designated use.

The section goes on to set guidelines for circulation of the petition and to require verification of the petition by the enforcement division. (Pet. App. E).

In an attempt to satisfy the residential waiver section, a principal in Petitioner corporation purchased a duplex that was within the 500 foot radius of the nightclub and placed employees of "Thee

Dollhouse III" there as residents. The owners and residents of the duplex then signed the petition. (Pet. App. B-8).

The eight signatures on the petition represented more than 51 percent of those persons residing or owning residential property within 500 feet of Petitioner's nightclub. (Pet. App. B-8). However, the petition did not contain any signatures of persons owning commercial property or operating businesses within the 500 foot radius. Since there were many more than 15 persons within the group of potential signatories, the petition did not contain the required number of signatures. Broward County rejected the petition on or about December 22, 1987, for that reason. (Pet. App. B-9).

The waiver provision has been consistently interpreted by the Broward County Building and Zoning Enforcement Division to require signatures of 51 percent of a group of persons which includes owners of real property, residents, and owners or operators or managers of businesses within 500 feet of the proposed adult use. (Pet. App. B-9). Broward County has granted waivers to other petitioners pursuant to this interpretation of the provision. (Pet. App. B-10).

There was no evidence introduced at the 1989 trial regarding Broward County's treatment of Petitioner with respect to the 1,000 foot church distance provision. (Pet. App. B-11). The only testimony offered by Petitioner at the trial of this case that was admitted in evidence was concerning the circulation and submission of the waiver petition and the purchase and sale prices of the duplex residence within the 500 foot radius. (Pet. App. B-10, 11).

The district court held the Broward County distance ordinances to be valid as applied, which decision was upheld by the United States Court of Appeals for the Eleventh Circuit.

SUMMARY OF ARGUMENT

The court of appeals below properly upheld the validity of Broward County's adult use distance ordinances as applied to Petitioner's nightclub. After discussing the various opinions expressed in the Court's recent decision, *Barnes v. Glen Theatre, Inc.*, 501 U.S.

___, 111 S.Ct. 2456; 115 L.Ed.2d 504 (1991), the court of appeals correctly determined that the case at bar is controlled by *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). The court of appeals then carefully applied the standards established in *Renton* and concluded that the Broward County distance ordinances are valid, content neutral, "time, place and manner" regulations.

Contrary to Petitioner's claim, the court of appeals did not relax the standard set in *Renton* regarding what evidence must be presented to show that a local government adopted an ordinance for the substantial purpose of preventing the negative secondary effects of adult businesses. The Broward County distance ordinances expressly state that they were adopted to combat the "deleterious effect" of adult businesses. Further, the evidence presented at trial established that Broward County had relied on the experiences of the City of Detroit in enacting its regulations, which is clearly permitted by the *Renton* test.

The decision of the court of appeals in this case did not conflict with other Eleventh Circuit decisions or the decisions of other circuits. The cases Petitioner cites as being in conflict with the instant case regarding the necessary type and amount of evidence of "negative secondary effects" predate *Renton* and should no longer be raised in support of Petitioner's argument. The cases also can be factually distinguished from the case at bar. Any language in those cases that imposes a greater burden on local governments than what the Court accepted in *Renton*, is no longer valid. There is no conflict, therefore, which requires this Court to accept jurisdiction of the instant case.

Petitioner, finally, suggests that the Court should apply a more stringent test than the "narrowly tailored" test in cases like the one at bar. The Court recently addressed and rejected this suggestion in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The "narrowly tailored" standard requires a sufficiently close fit between the governmental interest furthered by such regulations and the effect on protected expression, while still permitting local governments the necessary flexibility to address local problems. Since there is no conflict between the court of appeals decision in this case and the holdings of this Court or the circuit courts, and since there is no need

to alter the well-established tests applied below, there is no reason for the Court to accept jurisdiction of this case.

ARGUMENT

The court of appeals' application of *City of Renton v. Playtime Theaters, Inc.*, to uphold the Broward County distance ordinances was correct and consistent with the holdings of this Court.

This case is controlled by this Court's previous holdings in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and is not inconsistent with the Court's recent holding in *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Those cases provide clear guidelines to the lower federal courts and local governments regarding the proper method of regulation of adult-oriented businesses through the zoning power. The controlling law is well-settled and was correctly applied by the court of appeals. The conflict alleged by Petitioner does not exist because the cited decisions of the Fifth and Eleventh Circuits were decided before this Court ruled clearly in *City of Renton v. Playtime Theaters, Inc.* There is, therefore, no reason for the Court to exercise its discretion and accept jurisdiction in this case.

I. Considering the facts of *Barnes v. Glen Theatre, Inc.*, and the differing bases for the Court's holding in that case, *City of Renton v. Playtime Theaters* still controls the question of whether Broward County's zoning ordinances regulating adult-oriented businesses were valid as applied to Petitioner.

Petitioner extensively discusses the Court's opinions in *Barnes v. Glen Theatre, Inc.*, but does not really suggest that the court of appeals should have applied *Barnes* rather than *City of Renton v. Playtime Theaters, Inc.*, to this case. Nor does Petitioner suggest that the instant case would have a different outcome under any of the

analyses used in *Barnes*. *Barnes* will be discussed herein because it is the most recent treatment by the Court of a nude dancing regulation. The *Renton* case, however, more directly addresses the case at bar, and any difference between the analysis ultimately used by the court of appeals in this case and the Court in *Barnes* is insignificant.

Barnes v. Glen Theatre, Inc., 501 U.S. ____, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), concerned the enforcement of a public indecency statute to prohibit nude dancing in adult nightclubs. The Indiana public indecency statute prohibited nudity in places of public accommodation. *Id.* at ____, 115 L.Ed.2d at 513. Chief Justice Rehnquist announced the judgment of the Court and wrote an opinion in which Justice O'Connor and Justice Kennedy joined. The justices joining in this plurality opinion found the statute was valid as applied because it was supported by a substantial governmental interest in the protection of the public morals, and the statute satisfied the other tests described in *United States v. O'Brien*, 391 U.S. 367 (1968).

Justice Scalia concurred separately to explain that statutes regulating conduct, which incidentally affect expression, should not be analyzed under first amendment precedents at all unless they were adopted for the purpose of prohibiting expression. *Barnes* at ____, 115 L.Ed.2d at 518. Justice Souter also wrote separately, concurring in the judgment, because the Indiana statute was supportable as a regulation intended to prevent the negative secondary effects of adult-oriented businesses. *Id.* at ___, 115 L.Ed.2d at 521.

The court of appeals reviewed these opinions and determined that *Barnes* did not directly control the Broward County case. Since the Court was divided in *Barnes*, the court of appeals viewed the case as resting on its narrowest basis, which was Justice Souter's concurring opinion. *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1160 (11th Cir. 1991). Justice Souter upheld the Indiana statute on the basis of the *Renton* decision, which is a more stringent test than the tests used in the plurality opinion or Justice Scalia's concurrence. The court of appeals tested the Broward County ordinances against the most exacting of the standards used by members of this Court to uphold the statute in *Barnes* and found them valid.

It would seem that the Broward County regulations at issue here may be upheld under any of the three rationales used to sustain the statute in *Barnes*. The Indiana statute was a general prohibition that was scrutinized as applied to nude dancing establishments. All five justices that upheld the statute determined that it either did not implicate protected expression at all, or was adopted for a purpose unrelated to the suppression of speech, and was, therefore, "content neutral." The Broward County distance ordinances, likewise, are explicitly directed at the negative secondary effects that accompany certain adult-oriented uses and are, therefore, "content neutral."

This Court clearly established in *Renton* a three-part test for measuring the validity of local zoning ordinances that impact protected expression:

> The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication.

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 50 (1986). The third part of the test was explained later in the opinion where the Court said, "[m]oreover, the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects . . ." *Id.* at 52.

The court of appeals recognized that both the *Renton* "time, place and manner" test that is used to measure the validity of content-neutral regulations, and the four-part test established in *United States v. O'Brien*, 391 U.S. 367 (1968), have been applied to cases involving regulations that incidentally affect protected expression. As the court of appeals noted, this Court has found that the two tests are essentially the same and lead to the same results when applied. *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1162 (11th Cir. 1991).[1]

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[1] The four-part test in *O'Brien* provides that an ordinance regulating symbolic conduct is valid:

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest

The court of appeals below determined that the ordinance at issue in this case was more like the regulation challenged in *Renton* than the public indecency statute at issue in *Barnes v. Glen Theater, Inc.*, 501 U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), and, therefore, applied the "time, place and manner" test. The Broward County distance ordinances are zoning regulations, like those at issue in *Renton*. The distance ordinances at issue here also set similar minimum distances between the same types of businesses as the ordinance in *Renton*, although the cases have been litigated concerning different types of "expressive" activity. *Renton*, 475 U.S. at 44; *International Eateries of America, Inc. v. Broward County*, 726 F.Supp. 1568, 1571 (S.D. Fla. 1989). This decision by the court of appeals was clearly appropriate for the reason stated, and also because zoning regulations are, conceptually, regulations that permit and direct particular uses of land in the most appropriate place and manner for the local community.

II. The court of appeals correctly applied the test established in *Renton* to hold the Broward County adult use distance ordinances to be content neutral and narrowly tailored as applied to Petitioner.

The court of appeals reviewed the trial record and correctly applied the elements established in *Renton* to uphold the Broward County distance ordinances as applied. The court first considered whether the distance ordinances furthered a substantial governmental interest. The legislative basis of the distance ordinances is set forth

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is unrelated to the suppression of free expression; and if the incidental restriction on alleged First amendment freedoms is no greater than is essential to the furtherance of that interest.

United Statest v. O'Brien, 391 U.S. 367, 377 (1968). This test is substantially similar to the test in *City of Renton v. Playtime Theaters, Inc.* All legislation must be within the constitutional power of the government. Both tests require that the regulation further a substantial governmental interest; as Justice Souter noted in *Barnes v. Glen Theatre, Inc.*, the "content neutral" requirement of Renton equates to the requirement in *O'Brien* that the governmental interest be unrelated to the suppression of expression; the "narrowly tailored" element from *Renton* is the same as the requirement that the restriction of First Amendment freedoms be no greater than necessary to further the governmental interest. *See Barnes* at ____, *115 L.Ed.2d at 524*.

in the "whereas" clauses in Respondent's Appendix. (B.C. App. A-1, A-2, A-9, A-10). The distance ordinances state that they were adopted to combat the deleterious effects of certain adult-oriented businesses on residential areas and neighborhood businesses. The testimony received in *Dollhouse I* supported this legislative finding. *International Eateries of America, Inc. v. Broward County*, 726 F.Supp. 1556, 1564 (S.D. Fla. 1987). The testimony and planning study admitted in *Dollhouse I* established that the ordinances were narrowly tailored and left ample alternative sites for adult nightclubs.

A. The Broward County distance ordinances further a substantial governmental interest as applied to Petitioner.

The discussions of this Court in *Renton* and *Young* clearly establish that a local government's interest in protecting neighborhoods from downgrading and blight is a substantial governmental interest. *Young*, 427 U.S. at 71; *Renton*, 475 U.S. at 50. The Broward County distance ordinances were adopted expressly for those purposes. The Petitioner does not dispute that the court of appeals was correct to apply the test established by the Court in *City of Renton v. Playtime Theaters, Inc.*, to determine the validity of the Broward County distance ordinances as applied, but claims that the court of appeals somehow applied the test less stringently than required by the terms of *Renton*. (Petition at 17, 18.) In support of this claim, Petitioner states that the Broward County distance ordinances were simply "modeled after" the ordinance at issue in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and that *Renton* and other court of appeals decisions require more. Petitioner is wrong regarding both the characterization of the Broward County ordinances and the requirements of *Renton*.

The record below established that, just like the City Council of Renton, the Broward County Board of County Commissioners received information from its professional planning staff, relied upon the experiences of the City of Detroit, determined that certain businesses were causing detrimental secondary effects to the surrounding neighborhoods, and enacted remedial legislation. The Petitioner alleges that there was insufficient evidence presented at trial of the existence of negative secondary effects from adult businesses in Broward County for the district court to uphold this determination by

the Board of County Commissioners. (Petition at 20.)[2] However, Broward County appropriately relied on the experiences of Detroit, which was expressly permitted by this Court in *Renton*.

The Court in *Renton* recognized that local governments may rely on the experiences of other cities in enacting such ordinances.[3] In fact, the "whereas" clauses of the Broward County distance ordinances are very similar to the legislative findings the Court held to be sufficient in *Renton*. The finding of the district court in *Dollhouse I* that Broward County had relied on the experiences of the City of Detroit, rather than merely "mimicked" it, is supported by competent substantial evidence in the form of the ordinances themselves and testimony given in *Dollhouse I*.

Petitioner claims that the court of appeals, in finding that the Broward County distance ordinances had a sufficient basis, ruled inconsistently with the decision of the Fifth Circuit in *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982), and its own decision in *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985). The standards applied in those cases regarding the sufficiency of evidence presented to a local government of negative secondary effects have been significantly modified by *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), and the cases can be factually distinguished.

The Galveston ordinance at issue in *Basiardanes* had the effect of virtually banning all adult entertainment from the city and its distance provisions were struck down on that basis. 682 F.2d at 1213.

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[2] To the extent that this assertion is an attack on the facial validity of the ordinances, it was not before the court of appeals and is barred by res judicata. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *International Eateries of America, Inc. v. Broward County*, 726 F.Supp. 1568, 1574 (S.D. Fla. 1989). However, the court of appeals did consider the legislative basis of the ordinances in deciding their validity as applied to Petitioner.

[3] We hold that Renton was entitled to rely on the experiences of Seattle and other cities . . . in enacting its adult theater zoning ordinance. The first Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

City of Renton v. Playtime Theaters, Inc., 435 U.S. 41, 51 (1986).

The record in the instant case establishes that the Broward County distance ordinances leave ample opportunity for adult businesses to locate. (Pet. App. B-23). To the extent that the court in *Basiardanes* spoke disapprovingly of Galveston's reliance on the Detroit ordinances, that discussion must be evaluated in light of this Court's holdings in *City of Renton v. Playtime Theaters, Inc.* The *Basiardanes* case was decided before *Renton*, in which this Court specifically authorized local governments to rely on the experiences of other cities and counties.

Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985), which also pre-dated *Renton*, concerned an attempt to ban topless dancing under the state's twenty-first amendment authority, as delegated to the city. The court of appeals found the ordinance invalid because the evidence below clearly showed that the legitimate governmental interest asserted by the city was not, in fact, the reason the city adopted the ordinance. There is no such evidence of an illegitimate, hidden motive behind Broward County's action.

Again, to the extent that the Eleventh Circuit discussed what evidence a government may rely upon in adopting such ordinances, *Krueger* must now be read in light of *Renton*. As the court of appeals below found in this case, Broward County's reliance on the experiences of Detroit satisfied the standard recognized by the Court in *Renton*. Both *Krueger* and *Basiardanes* follow a line of court of appeals decisions rendered between *Young v. American Mini-Theatres* and *Renton* in which courts struck down adult-use zoning ordinances because the local government had not established by original planning studies a local factual basis to show that the ordinance would further a substantial purpose. These cases should no longer be cited for this invalid proposition. As one commentator recognized:

> [T]he above court decisions are now of dubious validity as precedent in regard to a city's burden of showing that location restrictions on adult uses further a substantial public purpose in view of the Supreme Court's decision in *City of Renton* . . .

2 Zeigler, *Rathkopf's The Law of Zoning and Planning* §17B.02, 17B-31 n.118 (1991).

There is no conflict between the court of appeals' holding in this case and the decisions of other circuits. This Court so clarified the applicable standards for adult-use distance ordinances in *City of Renton*, that the federal legal issues are well-settled.

B. The Broward County distance ordinances are narrowly-tailored as applied to Petitioner.

As discussed briefly above, the record also clearly shows that the distance ordinances at issue are narrowly tailored and leave ample opportunity for Petitioner to operate in Broward County.[4] Petitioner ineffectively attacks the court of appeals' narrowly-tailored finding on two bases: this Court should instead use the "least intrusive means" test, and the distance ordinances do not further a legitimate governmental interest. (Petition at 25). The sufficiency of the governmental interest in the ordinances at issue was fully discussed above. Regarding the appropriate test, Petitioner may certainly suggest that this Court abandon the "narrowly tailored" standard in these cases in favor of a more strict test, but such a change would be unwise. The "narrowly tailored" standard sufficiently protects private interests and provides local governments with the flexibility necessary to address diverse local conditions.

The Court very recently reaffirmed the applicability of the "narrowly tailored" standard and rejected the "least intrusive means" test in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The "narrowly tailored" standard recognizes that local governments must be given flexibility to address unique local problems. Petitioner asserts that the enforcement of certain Florida statutes would be a sufficient and less intrusive means of preventing the secondary effects of adult nightclubs. (Petition at 26). The statutes cited were general criminal, public health, and nuisance statutes. Statutes applicable statewide are not intended to provide specific remedies to address

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[4] The claim in footnote 19 of the Petition that the Broward County distance ordinances are not narrowly tailored because they include the residential waiver provision is clearly without basis. The inclusion of a waiver provision was certainly not constitutionally required, however, it demonstrates that Broward County has made every attempt to carefully craft the regulations to reach only the intended evil. As the court of appeals recognized, the Broward County waiver provision precludes arbitrary enforcement by its very terms.

unique local problems. Charter counties in Florida, such as Broward County, are vested with broad home rule powers to regulate for the protection of the public health, safety and welfare.[5] As Petitioner mentions in footnote 20 of the Petition, local governments have responded to local needs with a great variety of regulation. The "narrowly tailored" test requires a close enough fit between the governmental and private interests.

An examination of the court of appeals' decision below reveals that the court first determined that *Renton* controlled its analysis, and then carefully and correctly applied the test established in that case to uphold the Broward County distance ordinances as applied. Considering the clear statements of this Court in *City of Renton v. Playtime Theaters, Inc.*, and *Young v. American Mini Theatres, Inc.*, regarding the regulation of adult-oriented businesses, there is no conflict created by the decision below and there are no important questions of federal law raised by the Petition. There is, therefore, no reason for this Court to accept jurisdiction of this case.

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[5] Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

Fla. Const. art. VIII, § 1(g).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: February 17, 1992

APPENDIX

ORDINANCE NO. 77-48

AN ORDINANCE AMENDING CHAPTER 39 OF THE BROWARD COUNTY CODE OF ORDINANCES; PROVIDING FOR THE ESTABLISHMENT OF CERTAIN USES AND ACCESSORY USES WHICH, WHEN CLUSTERED TOGETHER OR LOCATED IN CLOSE PROXIMITY TO EACH OTHER, TEND TO DEVALUATE BUSINESS AND RESIDENTIAL PROPERTY VALUES; PROVIDING FOR THE REGULATION AND RESTRICTION OF THE LOCATIONS OF SUCH USES; PROVIDING DISTANCE LIMITATIONS BETWEEN SUCH USES AND CHURCHES AND SCHOOLS; PROVIDING FOR THE ADMINISTRATION AND ENFORCEMENT OF THIS ORDINANCE; PROVIDING FOR PENALTIES; PROVIDING FOR REPEAL OF CONFLICTING ORDINANCES; PROVIDING FOR SEVERABILITY; PROVIDING FOR INCLUSION IN THE CODE;AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, it has been demonstrated that the establishment of certain businesses in business districts has a deleterious effect on both business and residential segments of the neighborhood causing blight and a downgrading of the property values; and

WHEREAS, the prohibition against the establishment of two (2) designated uses within one thousand (1,000) feet of each other serves to avoid the clustering of certain businesses which, when located in close proximity to each other, tend to create a downgrading in both business and residential property values; and

WHEREAS, the concentration of certain uses and accessory uses in business districts tends to interfere with the operation of other businesses and tends to discourage patrons from trading with other business enterprises not included in the list of uses and accessory uses set forth in this Ordinance; and

WHEREAS, it is deemed that this Ordinance is necessary for the preservation of the public peace, morals, health, safety and welfare of the inhabitants of Broward County, Florida; NOW, THEREFORE,

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA:

Section 1. DEFINITIONS

1.01 Designated use.

For the purpose of this Ordinance, the term "designated use" shall mean and include such designated uses or accessory uses as shall be included in this Ordinance and which may from time to time be added to this Ordinance by amendment as the Board of County Commissioners of Broward County, Florida, in its continuing study of the various uses and accessory uses permitted in Chapter 39 of the Code of Ordinances of Broward County, Florida, may determine.

1.02 Adult Book Store.

For the purpose of this Ordinance, the term "adult book store" means and includes an establishment having as a substantial or significant portion of the stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or related to "Specified Sexual Activities" or "Specified Anatomical Areas" (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

1.04 [sic] Adult Motion Picture Theater.

For the purpose of this Ordinance, the term "adult motion picture theater" means and includes an enclosed building with a capacity of fifty (50) or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified Sexual Activities" or "Specified Anatomical Areas" (as defined below), for observation by patrons therein.

1.05 Adult Mini Motion Picture Theater.

For the purpose of this Ordinance, the term "adult mini motion picture theater" means and includes an enclosed building with a capacity for less than fifty (50) persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas" (as defined below), for observation by patrons therein.

1.06 Specified Sexual Activities.

For the purpose of this Ordinance, the term "specified sexual activities" shall mean and include:

(a) Human genitals in a state of sexual stimulation or arousal;

(b) Acts of human masturbation, sexual intercourse or sodomy; and

(c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

1.07 Specified anatomical Areas.

For the purpose of this Ordinance, the term "specified anatomical areas" shall mean and include:

(a) Less than completely and opaquely covered:

(1) Human genitals, pubic region;

(2) Buttock; and

(3) Female breast below a point immediately above the top of the areola; and

(b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

1.08 Group "D" Cabaret.

For the purpose of this Ordinance, the term "group 'D' cabaret" shall mean and include cabaret which features naked, topless or bottomless dancers, entertainers or waitresses, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar employees.

1.09 Massage Establishment.

The term "massage establishment", as used in this Ordinance, shall mean and include any shop, parlor, establishment or place of business wherein all or any one or more of the following named subjects and methods of treatments, are administered or practiced:

(a) Oil rubs, salt glows, hot or cold packs, all kinds of baths including steam rooms, cabinet baths, sitz baths, colon irrigations, body massage either by hand or by any mechanical or electrical apparatus or device (excluding fever therapy), applying such movements as stroking, friction, rolling, vibration, kneading, cupping, petrissage, rubbing, effleurage or tapotement.

(b) Nothing in this Ordinance shall be construed as applying to State of Florida-licensed barbers, cosmetologists, manicurists, pedicurists, physical therapists, physical therapists assistants, midwives, practical nurses, agents, servants or employees in licensed hospitals or nursing home or other licensed medical institutions, licensed physicians, osteopaths, chiropractors, podiatrists, naturopathic physicians or other licensed medical practitioners, or their agents, servants or employees acting in the course of such agency, service or employment.

1.10 Health spa.

For the purpose of this Ordinance, the term "health spa" shall mean and include all health studios, exercise salons, relaxation spas, health salons, health clubs and adult relaxation spas.

1.11 Encounter studio.

For the purpose of this Ordinance, the term "encounter studio" shall mean and include all establishments offering nude encounter sessions, encounter sessions between males and females, nude dance encounter sessions, and sexual consultations.

Section 2. DISTANCE LIMITATIONS BETWEEN DESIGNATED USES

2.01 In the development, enforcement and amendment of this Ordinance, it is recognized that there are uses and accessory uses which because of their very nature are recognized as having serious objectionable characteristics particularly when several of them are concentrated in any given location, thereby having a deleterious effect upon the adjacent business and residential areas. Special regulation of these uses is necessary to ensure that these adverse effects will not contribute to the blighting and downgrading of the surrounding neighborhood. None of the designated uses set forth in this Ordinance, or added from time to time to this Ordinance by amendment, shall be located nearer to the same or any other designated use nor nearer to any church or public, private or parochial elementary, middle or high school than one thousand (1,000) feet measured along the shortest possible line lying entirely within public streets, such measurement being between the nearest entrance to the designated use and the nearest entrance to another designated use, or the nearest entrance of the designated use and the nearest point on the plot occupied by the church or school.

Section 3. DESIGNATED USES

3.01 The following uses are declared to be "designated uses":

(a) Adult Book Store.
(b) Adult Motion Picture Theater.
(c) Adult Mini Motion Picture Theater.
(d) Group "D" Cabaret.
(e) Massage Establishment.
(f) Health Spa.
(g) Encounter Studio.

Section 4. APPLICATION TO NEW CHURCHES AND SCHOOLS

4.01 Where a designated use is located in conformity with the provisions of this Ordinance, the subsequent locating of a church or school within one thousand (1,000) feet of such existing designated use shall not be construed to cause such designated use to be in violation of this Ordinance.

Section 5. ORDINANCE NOT RETROACTIVE

5.01 The provisions of this Ordinance shall not be construed to be retroactive, and any existing designated use which conformed to the regulations in effect when such designated use was established shall not be rendered illegal or in violation through the adoption of this Ordinance or amendments to this Ordinance, so long as the occupational license issued for such use remains in full force and effect and is renewed in a timely manner.

Section 6. PENALTY

6.01 Any person convicted of a violation of this Ordinance shall be punished as provided by law.

Section 7. REPEAL OF CONFLICTING ORDINANCES

7.01 All ordinances or parts of ordinances in conflict herewith are hereby repealed only to the extent necessary to give this Ordinance full force and effect.

Section 8. SEVERABILITY

8.01 If any section, sentence, clause or phrase of this Ordinance is held to be invalid or unconstitutional by any Court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this Ordinance.

Section 9. INCLUSION IN CODE

9.01 It is the intention of the Board of County Commissioners that the provisions of this Ordinance shall become and be made a part of the Broward County Code; and that the sections of this Ordinance may be renumbered or relettered and the word "ordinance' may be changed to "section," "article," or such other appropriate word or phrase in order to accomplish such intentions.

Section 10. EMERGENCY ENACTMENT

10.01 This Ordinance shall be immediately certified by the Clerk of the Board to the Department of State and shall take effect upon receipt of official acknowledgment from that office that it has been filed, or, if adopted as an emergency enactment, upon its mailing by Special Delivery and Registered Mail to the Department of State.

ENACTED this 16th day of September, A.D., 1977.
FILED WITH DEPARTMENT OF STATE
September 22, 1977
EFFECTIVE September 26, 1978

AP:ed
9/20/77
1086-358

ORDINANCE NO. 78-33

AN ORDINANCE RELATING TO THE PROHIBITION OF CERTAIN DESIGNATED USES WITHIN FIVE HUNDRED (500) FEET OF THE RESIDENTIALLY ZONED DISTRICTS LISTED HEREIN EXCEPT WHEN FIFTY-ONE PERCENT (51%) OF THOSE PERSONS OWNING REAL PROPERTY, RESIDING OR DOING BUSINESS WITHIN FIVE HUNDRED (500) FEET OF THE PROPOSED LOCATION WAIVE SAID PROHIBITION AS HEREIN PROVIDED; AMENDING CHAPTER 39 OF THE BROWARD COUNTY CODE OF ORDINANCES AND ORDINANCE NO. 77-48 ACCORDINGLY; AMENDING ORDINANCE NO. 77-48 TO CHANGE THE METHOD OF MEASURING DISTANCES RELATING TO ALL DESIGNATED USES; PROVIDING FOR PENALTIES; PROVIDING FOR SEVERABILITY PROVIDING FOR INCLUSION IN THE CODE; AND PROVIDING FOR AN EFFECTIVE DATE.

(Sponsored by Commissioner Kolb)

WHEREAS, it has been demonstrated that the establishment of certain businesses in business districts has a deleterious effect on both the business and residential segments of the neighborhood, causing blight and a downgrading of the property values; and

WHEREAS, the prohibition in Ordinance No. 77-48 against the establishment of two (2) designated uses within one thousand (1,000) feet of each other serves to avoid the clustering of certain businesses which, when located in close proximity to each other, tend to create a downgrading in both business and residential property values; and

WHEREAS, such prohibition fails to avoid the deleterious effects of blight and devaluation of both business and residential property values resulting from the establishment of a designated use (an adult book store, adult motion picture theater, group "D" cabaret, massage establishment, health spa or encounter studio, as those terms are defined in Ordinance No. 77-48) in a business district which is

immediately adjacent to and which serves residential neighborhoods; and

WHEREAS, concern for a pride in the orderly planning and development of a neighborhood should be encouraged and fostered in those persons who comprise the business and residential segments of that neighborhood; and

WHEREAS, the Board of County Commissioners and the Building and Zoning Enforcement Division of the Community Services Department of Broward County, Florida, should be guided by the expressed will of those businesses and residents which are immediately adjacent to the proposed location of, and therefore most affected by the existence of, any designated use; and

WHEREAS, it is deemed that this Ordinance is necessary for the preservation of the public peace, morals, health, safety and welfare of the inhabitants of Broward County, Florida; NOW, THEREFORE,

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA:

Section 1. That Section 1 of Ordinance No. 77-48 is hereby amended by amending subsection 1.08 and subdivision (b) of subsection 1.09 and by adding subsections 1.12, 1.13, 1.14 and 1.15, to read:

1.08 Group "D" Cabaret.

For the purpose of this Ordinance, the term "group 'D' cabaret" shall mean and include <u>any place of business or establishment or</u> cabaret which features <u>the following</u> naked, topless or bottomless <u>employees</u>: dancers, entertainers or waitresses, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar employees.

<u>1.09 Massage Establishment</u>

...

(a)

...

(b) Nothing in this Ordinance shall be construed as applying to State of Florida-licensed barbers, cosmetologists, manicurists, pedicurists, physical therapists assistants, midwives, practical nurses, agents, servants or employees in licensed hospitals or nursing home or other licensed medical institutions, licensed physicians, osteopaths, chiropractors, podiatrists, naturopathic physicians or other licensed medical practitioners, or their agents, servants or employees acting in the course of such agency, service or employment under the supervision of the licensee."

1.12 Person

For the purpose of this Ordinance, the word "person" means and includes any adult individual, firm, association, joint venture, partnership, estate, trust, business trust, syndicate, fiduciary, corporation, or any combination thereof, or other entity.

1.13 Residentially zoned district.

For the purpose of this Ordinance, the term "residentially zoned district" means and includes districts R-1A, R-1B, R-1C, R-1P, R-1T, R-2, R-2P, R-2U, R-3, R-3U, R-4, R-4A, R-4B, R-5, R-6, T-1, T-1A, T-1B, T-1C, PUD, A-1, D-1, E-1 and E-2 in unincorporated Broward County and districts zoned residential in accordance with the ordinances or regulations of any municipality within Broward County.

1.14 Cabaret.

For the purpose of this Ordinance, the term "cabaret" shall mean and include any place wherein any type of alcoholic beverage is sold or given away for consumption on the premises and the operator thereof holds a license from the state of Florida to sell alcoholic beverages for consumption on the premises and wherein the

patrons are provided with entertainment or space for dancing.

1.15 Alcoholic Beverage.

For the purpose of this Ordinance, the term "alcoholic beverage" shall mean and include any beverage containing more than one (1) percent of alcohol by weight.

Section 2. That subsection 1.09 of Ordinance No. 77-48 is hereby amended by adding a subdivision (c) to read:

(c) Provided, however, that for the purpose of this Ordinance, the term "massage establishment" shall not include any massage establishment wherein at least one (1) State of Florida-licensed masseur or masseuse is employed and on duty fulltime during the hours open for business.

Section 3. That Section 2 of Ordinance No. 77-48 is hereby amended by amending subsection 2.01 and by adding subsections 2.02 and 2.03, to read:

2.01 In the development, enforcement and amendment of this Ordinance, it is recognized that there are uses and accessory uses which because of their very nature are recognized as having serious objectionable characteristics particularly when several of them are concentrated in any given location, thereby having a deleterious effect upon the adjacent business and residential areas. Special regulation of these uses is necessary to ensure that these adverse effects will not contribute to the blighting and downgrading of the surrounding neighborhood. None of the designated uses set forth in this Ordinance, or added from time to time to this Ordinance by amendment, shall be located nearer to the same or any other designated use nor nearer to any church or public, private or parochial, kindergarten, nursery, elementary, middle or high school,, or day care center that one thousand (1,000) feet. Measurement of the one thousand (1,000) feet shall be made in accordance with subsection 2.03 hereof. ~~measured along the shortest possible line lying entirely within public streets, such measurement being between the nearest entrance to the designated use, or the nearest entrance of the designated use and the nearest point on the plot occupied by the church or~~

~~school.~~

2.02 It shall be unlawful hereafter to establish any designated use within unincorporated Broward County if the proposed located is within five hundred (500) feet of a residentially zoned district. This prohibition shall be waived upon the presentment to the Building and Zoning Enforcement Division of a written petition requesting such waiver, signed by fifty-one percent (51%) of all those persons owning real property, residing or operating or managing a business within five hundred (500) feet of the proposed location of the designated use. The circulator of the petition requesting a waiver shall subscribe and swear to an affidavit attached to the petition that the circulator personally witnessed the signatures on the petition and that the signatures were affixed to the petition by the persons whose names appear on the petition. Said petition shall bear at the top of each page thereof a type written title in substantially the following form: "The undersigned hereby request a waiver from the Building and Zoning Enforcement Division of Broward County, Florida, that shall permit the establishment and location of a(an) (state specifically which designated use is sought to be established) within five hundred (500) feet of my real property, residence or business." Building and Zoning Enforcement Division shall carefully investigate the petition and signatures on the petition to verify that the petitioners do in fact own real property, or reside or do business in a residentially zoned district within five hundred (500) feet of the proposed designated use. Measurement of the five hundred (500) feet shall be made in accordance with subsection 2.03 hereof.

2.03 For the purposes of this Ordinance, a designated use or proposed designated use shall be deemed to be within one thousand (1,000) or five hundred (500) feet of another designated use or church, school, real property, residence, business or residentially zoned district, respectively, as defined or described herein, if any part of the building in which, or plot of land upon which, a designated use is locate or proposed to be located is within one thousand (1,000) feet or five hundred (500) feet, as the case may be, as measured by an actual or imaginary straight line upon the ground or in the air, of any part of the building in which, or plot of land upon which, another designated use or such church, school, real property, residence, business or residentially zoned district, respectively, is located..

Section 4. That Section 4 of Ordinance No. 77-48 is hereby amended, to read:

Section 4. APPLICATION TO NEW CHURCHES, ~~AND~~ SCHOOLS OR RESIDENTIALLY ZONED DISTRICTS

4.01 Where a designated use is located in conformity with the provisions of this Ordinance, the subsequent locating of a church or school within one thousand (1,000) feet, or a residentially zoned district within five hundred (500) feet, of such existing designated use shall not be construed to cause such designated use to be in violation of this Ordinance.

Section 5. PENALTY

5.01 Any person convicted of violating any portion of this Ordinance shall be punished as provided by law.

Section 6. SEVERABILITY

6.01 If any section, sentence, clause or phrase of this Ordinance is held to be invalid or unconstitutional by any Court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this Ordinance.

Section 7. INCLUSION IN CODE

7.01 It is the intention of the Board of County Commissioners that the provisions of this Ordinance shall become and be made a part of the Broward County Code; and that the sections of this Ordinance may be renumbered or relettered and the word "ordinance' may be changed to "section," "article," or such other appropriate word or phrase in order to accomplish such intentions.

Section 8. EFFECTIVE DATE

8.01 This Ordinance shall become effective as provided by law.

ENACTED this 27th day of June, A.D., 1978.
FILED WITH DEPARTMENT OF STATE THIS 6th DAY OF JULY, A.D., 1978.
EFFECTIVE THIS 11th DAY OF JULY, A.D., 1978.

AP:al
6/28/78
78-249